

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 189

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JAMES MINOR,

*Petitioner,*

—v.—

UNITED STATES,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**DOCKET ENTRIES**

67 Crim. 770

**THE UNITED STATES**

*vs.*

**JAMES MINOR**

T. 26, Secs. 4705(a) & 7237(b), U.S. Code.

Unlawfully selling, bartering, exchanging & giving  
away heroin not in pursuance of a written order  
of the Secretary of the Treasury.

(Two Counts)

**STATISTICAL RECORD**

J.S. 2 mailed ✓

J.S. 3 mailed ✓

Violation Comp. #48080

Title

Sec.

**COSTS**

Clerk

Marshal

Docket fee

**DATE**

**PROCEEDINGS**

9- 8-67 Filed Indictment.

9-11-67 A.F. Marra, assigned as atty. by Commissioner (B. Moldow) of counsel. Pleading adj'd to 9-14-67 bail fixed at \$2,500. deft. remanded in lieu of bail. McGOHEY, J.

9-14-67 Court directs entry of plea of Not Guilty. Def't remanded in lieu of \$2,500, bail previously fixed. Adj'd to 9-21-67. McGOHEY, J.

10-16-67 Filed waiver of trial by JURY marked Court's exhibit #1, signed by the defendant consented to by Counsel and Approved by WEINFELD, J.

## DATE

## PROCEEDINGS

- 10-16-67 TRIAL BEFORE JUDGE WEINFELD BEGUN WITHOUT A JURY. Trial concluded, The Court finds the defendant GUILTY AS CHARGED. Pre-sentence investigation ordered with the sentence adjourned to 11/9/67 at 10:00 A.M. defendant is REMANDED NO BAIL. WEINFELD, J.
- 10-25-67 Filed remand dated 9/11/67
- 11- 9-67 Filed Judgment: Deft. sentenced (atty present) to FIVE (5) YEARS on each of Cts. 1 & 2 to run concurrently with each other at a place of confinement to be designated by the Atty Gen'l. Deft. remanded. WEINFELD, J.
- 11- 9-67 Issued commitment & copies.
- 11- 9-67 Filed def't's notice of appeal in forma pauperis-Memo endorsed Leave granted to file notice of appeal without payment of statutory fee-WEINFELD, J. (copy mailed to def't. & to Warden, FDH, NYC and to U.S. Atty.)
- 11-16-67 Filed remand dated 10/16/17
- 11-21-67 JAMES MINOR—Filed Order that the defendant is granted leave to appeal in forma pauperis and that stenographic minutes of the trial be transcribed and that defense counsel be furnished a copy thereof, at the expense of the government pursuant to Title 28 U.S.C. S. 753(f). (Copies to be delv'd to Court Reporters by Legal Aid) WEINFELD, J. (Mailed notice on 11/22/67)
- 12- 1-67 Filed Commitment & entered return, Deft. Delivered to the Detention Hdqtrs NYC 11/9/67
- \* \* \*
- 2-14-68 Filed transcript of proceedings dated 10/16 and 11/9/67.
- A true extract of the docket entries.

Dated: May 6, 1968

/s/ John J. Olear, Jr.  
Clerk

[SEAL]

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

67 Crim. 770

[File Endorsement (Omitted in Printing)]

UNITED STATES OF AMERICA

—v.—

JAMES MINOR, DEFENDANT

INDICTMENT—Filed September 8, 1967

The Grand Jury charges:

On or about the 9th day of January, 1967, in the  
Southern District of New York,

JAMES MINOR,

the defendant, unlawfully, wilfully and knowingly did  
sell, barter, exchange and give away to

Francisco H. Guzman

approximately 22.000 grams of heroin hydrochloride, a  
narcotic drug, in that the said sale, barter, exchange  
and giving away was not in pursuance of a written  
order of the said Francisco H. Guzman on a form issued  
in blank for that purpose by the Secretary of the Treas-  
ury of the United States or his delegate.

(Title 26, Sections 4705(a) and 7237(b), United  
States Code)

USA-33s-448 A—IND./INF. (Sale of Narcotic Drugs  
Ed. 2/14/64 W/O Written order—succeeding count)

SECOND COUNT

The Grand Jury further charges:

On or about the 8th day of April, 1967, in the South-  
ern District of New York,

JAMES MINOR,

the defendant, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to

Francisco H. Guzman

approximately 19.500 grams of heroin hydrochloride, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Francisco H. Guzman on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, Sections 4705(a) and 7237(b), United States Code)

/s/ Robert M. Morgenthau  
United States Attorney

/s/ Samuel Schreckuj  
Foreman

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

67 Crim. 770

THE UNITED STATES OF AMERICA

*vs.*

JAMES MINOR, DEFENDANT

INDICTMENT

Narcotics.

Violation of Title 26, United States Code,  
Sections 4705(a) and 7237(b).

ROBERT M. MORGENTHAU  
United States Attorney.

A TRUE BILL

---

Foreman.

Filed Sep. 8, 1967,  
U. S. District Court, S. D. of N. Y.

SEP. 11, 1967

Anthony F. Marra, Assigned as Attorney by Commissioner Bernard Moldow, of counsel.

Pleading adjd. to 9/14/67. Bail fixed at \$2,500.  
Deft. *remanded* in lieu of bail.

/s/ McGohey, J.

SEP. 14, 1967

Court directs entry of plea of not guilty. Deft. *remanded* in lieu of \$2,500 bail previously fixed. Adjd. to 9/21/67.

/s/ McGohey, J.

OCT. 16, 1967

Trial begun, (Jury waiver signed), and concluded. Court finds defendant Guilty as Charged. Pre sentence report ordered, date of sentence November 9th, 1967—10:00 a.m. *Remanded*. No bail.

/s/ Weinfeld, J.

Paul Geelvani

NOV. 9, 1967

Defendant sentenced, Attorney present, to five (5) years on each of Counts 1 and 2 to run concurrently with each other, at a place of confinement to be designated by the Attorney General of the United States. *Remanded*.

/s/ Weinfeld, J.

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

67 Cr. 770

UNITED STATES OF AMERICA

v.

JAMES MINOR, DEFENDANT

TRANSCRIPT OF PROCEEDINGS OF NEW YORK,  
October 16, 1967, 2:15 P.M.

Before: HON. EDWARD WEINFELD, District Judge.

APPEARANCES:

ROBERT S. MORGENTHAU, United States Attorney, For  
the Government, DAVID A. LUTTINGER, Assistant U.S.  
Attorney.

EDWARD S. PANZER, Esq., Attorney for Defendant.

\* \* \*

[fol. 10] FRANCISCO GUZMAN, called as a witness,  
having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LUTTINGER:

Q Mr. Guzman, by whom are you presently employed?

A By the Federal Bureau of Drug Abuse Control. .

Q In which department of the government is that?

A Food and Drug Administration under Health, Edu-  
cation and Welfare.

Q How long have you been so employed?

A Approximately six months.

Q Prior to working for the Bureau of Drug Abuse  
Control, for whom did you work?

A As an agent for the Federal Bureau of Narcotics in  
New York City.

Q How long were you so employed as an agent for the Bureau of Narcotics?

A One year.

Q Prior to that, did you have any experience in law enforcement?

[fol. 11] A Yes, sir, I spent nine and a half years in the Air Force, the last two and a half as a special agent for the Office of Special Investigations, Inspector General's Office, Department of the Air Force.

Q Agent Guzman, during the course of your tenure with the Bureau of Narcotics did you have occasion to meet a person by the name of James Minor?

A Yes, sir, I did.

Q Do you see that person in the courtroom today?

A Yes, I do.

Q Will you point him out to the Court, please?

A The gentleman sitting right here at the table with his hand to his face.

Agent Guzman, will you tell the Court when for the first time you ever saw this person before?

A On January 9, 1967, in the evening.

Q Where did you see him?

A On 117th Street between Park Avenue and Madison Avenue.

Q Was there anyone else present at the time you met him?

A Yes, there was.

Q Who was that?

A An informant of the Bureau of Narcotics.

[fol. 12] Q Will you tell the Court upon meeting Mr. Minor what happened?

A I was introduced to Mr. Minor by the informant as Frank Santiago from New Jersey, and I was in New York to buy some heroin. I shook hands with Mr. Minor, and I told him that I wanted a half piece of heroin, that would be approximately a half ounce, and I asked him if he could get it for me. He said he could. I asked him the price, and he said it would \$325. I then asked him if I would have any trouble getting rid of it, if it was good stuff, and he said there shouldn't be any trouble at all, it was good stuff. I asked him if he had it, and he said

yes, and he handed me a brown paper bag which I opened up. It contained a quantity of white powder, and I handed Mr. Minor \$325 official government funds.

Q What did you do after this?

A I left with the informant, and we went to a pre-arranged location where we were later met by the surveillance team.

Q What time did you meet the surveillance agent?

A I don't remember the exact time. It was later in the evening about an hour afterwards.

Q Who were the other agents?

[fol. 13] A Agent Wilkocki, O'Grady and Raugh.

Q What did you do with the brown paper bag that you purchased from Mr. Minor?

A I initialed it and turned it over to Agent Wilkocki.

Q When?

A That same evening, sir, when we met.

Q Did you have occasion to meet Mr. Minor again?

A Yes, I did.

Q When was the next time?

A It was on the evening of January 24, 1967.

Q Was anyone else present when you met?

A The informant was.

Q Where did this meeting take place?

A On the corner of 117th Street and Park Avenue.

Q Will you tell the Court what happened on this occasion?

A I told Mr. Minor that I wanted to purchase five bundles of heroin, and he told me that he could do the business with me of the five bundles but that his wife was ill, I believe she was pregnant at the time, and he had relatives up the house and couldn't get to his stash, so we made arrangements to meet the following day at 3 P.M.

[fol. 14] Q Was there any conversation concerning the first purchase?

A Yes. I told Mr. Minor I wasn't too happy with the quality of the heroin, that it was a low grade, and he said this stuff that he had now as better, and he would make it up to me.

Q Did you return on the following day?

A Yes, sir, I did, but Mr. Minor wasn't there.

Q Did there ever come an occasion when you saw him again?

A Yes, I did, on April 8th, I believe it was, in the afternoon with the same informant again.

Q Where did you meet?

A In front of 57 East 117th Street.

Q How did you get to that location?

A In my personal automobile.

Q What happened when you arrived at that location?

A I sent the informant up to get Mr. Minor, and they both returned a few minutes later. Mr. Minor sat in the front seat of my vehicle, and I told him I wanted five bundles of heroin. Mr. Minor told me that he had the five bundles but it would cost me \$90 a bundle, and we had an argument over the price. I told Mr. Minor [fol. 15] that the going street price was 80 to 85 a bundle and he told me he knew that but that these were fat bags and better than average stuff, so under the circumstances I took the five bundles.

Q What did you do?

A I handed Mr. Minor \$450 official government funds. He handed me a brown paper bag containing five bundles of glassine envelopes, each containing a white powder, and he then departed by vehicle and the informant and I then drove to a prearranged location and met with surveilling agents.

Q What did you do with the bag and the contents?

A I initialed them and gave them to Agent Wilkocki.

MR. LUTTINGER: Will you mark these for identification?

(Government Exhibits 1 and 2 were marked for identification.)

MR. LUTTINGER: Your Honor, Government's Exhibit 1 for identification is a locksealed envelope which is in an opened condition. Exhibit No. 2 for identification is a locksealed envelope which is in a locked and a sealed condition. I am opening Exhibit No. 2 for identification, and from within Government's Exhibit 2 I am removing

[fol. 16] what I would ask be marked Government Exhibit 3 for identification.

(Government Exhibit 3 marked for identification.)

MR. LUTTINGER: Will you mark these Government Exhibits 4 and 5 for identification?

(Government Exhibits 4 and 5 marked for identification.)

Q Agent Guzman, I show you Government's Exhibit 3 for identification and ask you if you know what that is.

A Yes, sir. This is the brown paper bag that I received the white powder from Mr. Minor on the 9th of January. I have my initials, and it is dated, and I have—I put 66 rather than 67 on the date, and initialed over that where I made the correction.

THE COURT: What is the day on which you received that?

THE WITNESS: Sir? That was on January 9, 1967. But it was the beginning of the year, and I put 1966, and then I corrected it.

MR. LUTTINGER: Your Honor, Government Exhibit 4 for identification, like Government's Exhibit 1, is a lock-sealed envelope in an opened condition. Government's Exhibit 5 for identification is a locksealed envelope which [fol. 17] is locked and sealed. Opening Exhibit 5 for identification I am removing from that its contents and ask that they be marked Government Exhibits 6 and 6-A for identification.

(Government Exhibits 6 and 6-A marked for identification.)

Q Agent Guzman, I show you 6-A for identification and ask you if you can tell the Court what that is.

A This is the brown paper bag I received the five bundles of white powder from Mr. Minor. Each one of the bundles would have my initials and the date, and the brown paper bag also has my initials and the date.

Q Was there anything inside of 6-A when you just received it now?

A Yes, there is five bundles of glassine envelopes wrapped with an orange rubberband, each one containing my initials and the date.

Q I show you Government's Exhibit 6 for identification. Will you look at that and see whether or not you can identify?

A Yes, sir. This is the substitute container when each one of the bags that you are holding was opened and the contents were poured into one large bag, which I initialed.

[fol. 18] MR. LUTTINGER: Your Honor, I have no further questions of this witness.

THE COURT: Will you please turn over all 3500 material, including the grand jury minutes?

(Government Exhibits 3500, 3501, marked for identification.)

MR. LUTTINGER: Your Honor, I am turning over copies of Exhibits 3500 and 3501 to Mr. Panzer. I will say to the Court that this witness did not testify before the grand jury, at least to my knowledge.

MR. PANZER: I would request if the government has any evidence that would be favorable or material to the defendant's defense that they turn that over to me, also.

MR. LUTTINGER: I know of no other documents or evidence that the government has in its possession to which the defense is entitled under any case or any statute.

MR. PANZER: May I have a few moments to look at this, your Honor?

THE COURT: Yes.

### CROSS-EXAMINATION

BY MR. PANZER:

Q That is Agent Guzman, is that correct?

A Yes, sir.

[fol. 19] Q Agent Guzman, you were introduced to Mr. Minor through an informer, is that correct?

A Yes, sir.

Q This informer, he had been working for the Federal Bureau of Narcotics, is that correct?

A Yes, sir.

Q Was this informer some time during his life addicted to drugs?

MR. LUTTINGER: Your Honor, I object, unless the witness can state whether he knows of his own knowledge.

A I don't know, sir.

Q Do you know if he had any convictions for possession of narcotics?

A Are you speaking of at the time ~~worked~~ with him or now?

Q Any time.

A Yes, sir.

Q On this first occasion which took place on January 9, 1967, that happened in the vicinity of 116th Street, right?

A What happened in the vicinity of 116th Street?

Q The alleged transaction that you said took place on January 9, 1967.

[fol. 20] A No, sir, it did not.

Q Where did it take place?

A On 117th Street.

Q Could you tell me what time that was?

A It was at approximately 8:45 P.M., sir.

Q At the time of the transaction who was present?

A The informant, Mr. Minor, and myself.

Q Did the informant and Mr. Minor approach you, or did you approach them?

A I don't understand the question, sir.

Q Well, you got there before 8:45 P.M., in that vicinity?

A Yes, sir, I did.

Q What did you do when you got there?

A I stood up on the corner by Madison and 117th while the informant went to get Mr. Minor.

Q I see. So the informant went to get Mr. Minor, is that correct?

A Yes, sir.

Q And he came back with him?

A Yes, sir.

Q Do you know where he went?

A Into 57 117th.

[fol. 21] Q Is that where Mr. Minor was supposed to have been living at that time?

A To the best of my knowledge, yes, sir.

Q What happened after that?

A They came down and I came from the corner of 117th and Madison to the middle of the block, more or less, as an approximation the middle of the block, across the street from 57. That would be on the south side of 117th.

Q So that you were not with the informant when he went to pick up Mr. Minor, is that correct?

A Correct.

Q So you don't know what he said to him, is that correct?

A That's correct.

Q This transaction on January 9, 1967, how long did it take?

A Approximately four, five minutes.

Q Did it take place out in the street?

A Yes, sir, it did.

Q By the way, had you seen Mr. Minor prior to January 9, 1967?

A No, sir, I hadn't.

Q You say the second transaction took place on April [fol. 22] 8, 1967, is that correct?

A Yes, sir.

Q On that evening did the informant also go to see Mr. Minor before Mr. Minor met you?

A That transaction took place in the afternoon?

Q Yes.

A I don't know, because Agent Wilcocki was handling the arrangement. I was just available. Agent Wilcocki would call me up and say, "I have a buy; and go do it." So I don't know what arrangements were made.

Q At any rate, you arrived at the vicinity of 117th Street and Madison Avenue, is that correct?

A That afternoon, yes, sir.

Q What time was that?

A About 3:45 when we got to 117th Street, roughly.

Q When you saw Mr. Minor, who was in his company?

A I came to 117th Street with the informant and I sent him up to get Mr. Minor and they both came down a few moments later.

Q That was on April 8, 1967?

A Yes, sir.

Q And you don't know what the informant said to Mr. Minor on that day?

A No, sir, I don't.

[fol. 23] Q The transaction that was supposed to have occurred on April 8, 1967, where did that occur?

A In my personal automobile.

Q What kind of an automobile was it?

A A 1963 Valiant, beige in color, four door.

Q Did Mr. Minor sit in front of the car or did he come into the car at all?

A Yes, sir.

Q Did he come into the front or into the rear?

A He sat in the front next to me. I was driving.

Q How long did that transaction take?

A Approximately ten minutes.

Q In between January 24, 1967, and April 8, 1967, did you have occasion to see Mr. Minor?

MR. LUTTINGER: I am sorry, I didn't get the dates.

MR. PANZER: January 24, 1967, he—

THE COURT: You don't mean January 24th, you mean the first indictment, is that it?

MR. PANZER: I believe there was mention in his direct testimony—

THE COURT: I am sorry, you do mean that subsequent date.

[fol. 24] A Between January 24th and April 8th, no, sir, I didn't.

Q When was the next time you saw the defendant after April 8, 1967?

A It was during the end of April some time. I am not specific on a date. I don't remember it. I think it was near the end of April.

Q Was he in custody at that time?

A No, sir.

Q Now, sir, this informant, how long was he working for the Federal Bureau of Narcotics?

A I don't know, sir. He is not my informant. I am really not qualified to answer.

Q Did you discuss anything with him?

A Who?

Q Did you discuss the case with him before you came to court today?

A Did I discuss the case with the informant?

Q Yes.

A We went over it, yes, sir.

Q You are pretty familiar with his background, aren't you?

A No, sir, he is not my informant.

Q Let me ask you this: at the second transaction you [fol. 25] say you gave Mr. Minor \$450, is that correct?

A Yes, sir.

Q Did he give any part of that money to the special employee?

A No. Not to my knowledge, no, sir. If he did, it wasn't in front of me is what I mean.

Q The special employee left with you that day, didn't he?

A Yes, he did.

Q So if he did give him some money you would see it, is that correct?

A Yes, sir.

Q Was the special employee paid any funds?

A I don't know, sir. It is not my special employee so I don't know what arrangements were made with him. I was just the buying agent.

Q Whose special employee is he?

A Agent Wilkocki's. He would be better qualified to answer those questions than I would.

Q I didn't ask you if he was better qualified, I just asked you whether you knew?

A No, sir, I don't know.

MR. PANZER: I have no further questions, thank you.

[fol. 26] MR. LUTTINGER: Just one.

## REDIRECT EXAMINATION

BY MR. LUTTINGER:

Q Mr. Panzer asked you whether or not you were aware that the informant had a narcotics conviction, and you answered yes, is that correct?

A Yes, I did.

Q Do you know when that conviction was?

A No, sir, I don't know.

MR. LUTTINGER: I have no further questions.

THE COURT: The witness is excused.

Please call the next witness.

(Witness excused)

\* \* \* \*

[fol. 48] FRANCISCO H. GUZMAN, recalled.

## DIRECT EXAMINATION

BY MR. LUTTINGER:

Q Mr. Guzman, just one or two questions. On the evening of January 9, 1967, when you testified that you met Mr. Minor, at any time during the course of that evening did you exhibit to Mr. Minor any order for the purchase of heroin on that occasion?

A No, sir, I did not.

Q In any form other than your oral request for it?

A I exhibited no order.

Q Again with respect to April 8, 1967, did you at that time exhibit any order of any kind other than your oral order?

A No, sir.

Q For heroin.

A No, sir, I did not.

MR. LUTTINGER: I have no further questions.

THE COURT: There was no form issued in blank for the sale of the material you received that night issued by the Secretary of the Treasury of the United States?

THE WITNESS: Not to my knowledge, sir.

THE COURT: You may cross.

MR. PANZER: I have no cross.

MR. LUTTINGER: I have one further request before I close my case, your Honor. I would offer into evidence the Government's Exhibits 3 and 6 for identification.

MR. PANZER: No objection.

(Government Exhibits 3, 6 and 6-A received in evidence.)

THE COURT: Does that conclude the government's case?

MR. LUTTINGER: Yes, your Honor, and the government rests.

MR. PANZER: Your Honor, at this time my motion would be for a judgment of acquittal as a matter of law.

THE COURT: The motion is denied.

\* \* \* \*

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 67 Cr. 770

[File Endorsement (Omitted in Printing)]

UNITED STATES OF AMERICA

v.

JAMES MINOR

JUDGMENT AND COMMITMENT—January 9, 1967

On this 9th day of November, 1967 came the attorney for the government and the defendant appeared in person and<sup>1</sup> by counsel

IT IS ADJUDGED that the defendant upon his plea of<sup>2</sup> Not Guilty and a finding of Guilty by the Court, the defendant having waived trial by jury, has been convicted of the offense of unlawfully, wilfully and knowingly selling, bartering, exchanging and giving away heroin not in pursuance of written orders on forms issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate (Title 26, Sections 4705(a) and 7237(b), U.S. Code) as charged<sup>3</sup> in 2 Counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of<sup>4</sup> FIVE (5) YEARS on each of Counts 1 and 2 to run concurrently with each other.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United

States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward Weinfeld  
United States District Judge

/s/ John J. Olear, Jr.  
Clerk

*Forma Pauperis* Leave granted to file notice of appeal without payment of the statutory fee.

/s/ Edward Weinfeld  
U.S.D.J.  
Nov. 9, 1967

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Action Number 67 Cr. 770

[File Endorsement (Omitted in Printing)]

UNITED STATES OF AMERICA

vs.

JAMES MINOR

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT—Filed November 9, 1967

Notice is hereby given that DEFENDANT above named, hereby appeals to the United States Court of Appeals

for the Second Circuit from the \* SENTENCE IM-  
POSED NOV. 9, 1967.

Signed Anthony F. Marra

by /s/ Edward Panzer  
Attorney for James Minor  
Address  
Room 9 U. S. Court House  
Foley Sq. 7, N. Y. C.

Notice to: SEE REVERSE SIDE

\* Insert whether order or final judgment:  
or part thereof appealed from.

cc: MR. JAMES MINOR  
Federal Detention Headquarters  
427 West Street  
New York, New York 10014

W. W. FITZPATRICK, Warden  
Federal Detention Headquarters  
427 West Street  
New York, New York 10014

ROBERT M. MORGENTHAU  
United States Attorney  
Southern District of New York  
U. S. Courthouse, Foley Square, New York  
New York, New York 10007

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

No. 527—September Term, 1967.

(Argued June 11, 1968                      Decided July 3, 1968.)  
Docket No. 31953

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UNITED STATES OF AMERICA, APPELLEE

—v.—

JAMES MINOR, APPELLANT

---

Before: FRIENDLY, SMITH and KAUFMAN, *Circuit Judges*.

---

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Weinfeld, J., for selling narcotic drugs not in pursuance of a written order form in violation of 26 U. S. C. § 4705(a).

Affirmed.

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JOHN S. ALLEE, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney, Pierre N. Leval, Assistant United States Attorney, of counsel), *for appellee*.

PHYLIS SKLOOT BAMBERGER, Legal Aid Society, New York, N. Y. (Anthony F. Marra, of counsel), *for appellant*.

---

KAUFMAN, *Circuit Judge*:

The sole question presented is whether the Fifth Amendment privilege against self-incrimination affords a defense to a prosecution for selling narcotic drugs with-

out the mandatory written order form required by 26 U. S. C. § 4705(a).<sup>1</sup>

Following a trial before Judge Weinfeld without a jury, appellant James Minor was found guilty on two counts of selling heroin hydrochloride without the prescribed Treasury Department written order form. He was sentenced to the statutory minimum of five years' imprisonment on each count, the sentences to run concurrently. On this appeal, Minor does not allege the commission of any error by the Judge at the trial and concedes that we must affirm if we conclude that requiring compliance with § 4705(a) does not contravene the privilege against self-incrimination. Thus, for our purposes it is sufficient to note that Minor's one-day trial was not atypical of the usual humdrum narcotics prosecution. The government's case was presented through the testimony of federal agents and the defendant introduced evidence purporting to show that he was entrapped. Any conflicts or discrepancies in the testimony were obviously for the fact-finder to resolve, *United States ex rel. Anderson v. Fay*, — F. 2d — (2d Cir. 1968) (*per curiam*). Accordingly, we turn at once to consideration of Minor's Fifth Amendment claim.<sup>2</sup>

The problem before us has its genesis in a trilogy of recent decisions in which the Supreme Court reemphasized the importance of the privilege against self-incrimination in our adversary system of criminal justice and extended its reach to those "inherently suspect of criminal activities," *Albertson v. S. A. C. B.*, 382 U. S. 70,

<sup>1</sup> Section 4705(a) provides that:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate." (Emphasis supplied.)

<sup>2</sup> Although Minor did not claim a violation of his Fifth Amendment rights before Judge Weinfeld, the government does not contend that this failure presents a bar to reversal of his conviction. See *Grosso v. United States*, 390 U.S. 62, 70-72 (1968); *United States v. Manfredonia*, — F.2d — (2d Cir. 1968).

79 (1965), who are required by certain statutes to register with the Secretary of the Treasury or to pay special taxes. In *Marchetti v. United States*, 390 U. S. 39 (1968), the Court reversed a conviction under the federal wagering tax statutes for evading payment of the annual occupational tax, 26 U. S. C. § 4411, and for wilfully failing to register with the Treasury, 26 U. S. C. § 4412; in *Grosso v. United States*, 390 U. S. 62 (1968) a conviction for violating § 4411 and for failing to pay the special excise tax imposed on wagering, 26 U. S. C. § 4401, was set aside; in *Haynes v. United States*, 390 U. S. 85 (1968), the same fate befell a conviction for knowingly possessing a firearm, 26 U. S. C. § 5851, which had not been registered as required by 26 U. S. C. § 5841. In all three instances, Mr. Justice Harlan, speaking for the Court, reasoned that the petitioner was confronted by a comprehensive statutory scheme directed against a proscribed activity and was required, on pain of prosecution, to provide the government with information that might be used to convict him of a crime.

Minor claims here that the prohibition against the transfer of narcotics except in pursuance of a written order form is comparable to the provisions before the Supreme Court in *Marchetti*, *Grosso* and *Haynes* and that consequently his conviction must fall. Although § 4705(a) has been enforced against thousands of violators since its enactment in 1914, 38 Stat. 786, including cases which reached the Supreme Court, e.g., *Gore v. United States*, 357 U. S. 386 (1958), we recognize that the Court's recent pronouncements require a fundamental reevaluation of the statute.<sup>3</sup> Our examination of the statutory scheme convinces us, however, that *Marchetti* and its companion cases are not dispositive of this appeal and that there is no conflict between enforcement of § 4705(a) and the purpose, philosophy and spirit of the privilege against self-incrimination.

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<sup>3</sup> The Supreme Court recently granted certiorari in *Leary v. United States*, — U.S. — (April 27, 1968), in which one of the issues presented is the validity of the marijuana tax and registration provisions in light of the privilege against self-incrimination. 36 U.S. L. W. 3466.

Considered *in vacuo*, compliance with § 4705(a) does not present any threat of self-incrimination. It simply provides that no sale may be made except to one who furnishes an appropriate Treasury Department written order form. The statutory language makes manifest—and Minor concedes—that the purchaser of narcotics and not the seller is under compulsion to apply for and obtain the requisite order form.<sup>4</sup> Even if we were to assume *arguendo* that the registration and tax provisions infringe upon the purchaser's Fifth Amendment rights because order forms are available only to prospective purchasers who have registered under 26 U. S. C. § 4722 and paid the special tax imposed by 26 U. S. C. § 4721,<sup>5</sup> see 26 U. S. C. § 4705(f), it hardly follows that a *seller*, such as Minor, is immune from prosecution for selling to a person who failed to provide the form. We need cite no authority for the principle that the privilege afforded by the Fifth Amendment is personal and that under the circumstances present here a seller cannot benefit from the privilege allegedly available to the buyer. Whatever views Minor may have had concerning passing of possession of heroin, it is clear that standing under the Fifth Amendment is not freely negotiable nor transferable.

Minor maintains, however, that § 4705(a) must be examined in the context of the entire statutory and regulatory scheme and that when so viewed the potential for incrimination becomes apparent. Specifically, he argues that 26 C. F. R. § 151.185 requires the seller to enter on the form supplied by the buyer the number and size of the stamped packages of drugs furnished and the date that each order was filled. In addition, both the seller and the buyer must preserve a copy of the form for 2

<sup>4</sup> See note 1, *supra*.

<sup>5</sup> Section 4722 provides, in relevant part, that "every person who engages in any of the activities enumerated in section 4721 shall register with the Secretary or his delegate his name or style, place of business . . ."

Section 4721 provides, in relevant part, that "every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away narcotic drugs shall pay the special taxes hereinafter provided."

years and keep it readily accessible to inspection by appropriate government officials, 26 U. S. C. §§ 4705(d) and (e);<sup>6</sup> and a third copy of the form must be forwarded by the seller to the narcotic district supervisor of the district in which the seller is located, 26 C. F. R. § 151.201. Minor urges, therefore, that the information he was required to furnish and make available to the government "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" under a number of statutes. See *Marchetti v. United States*, *supra*, 390 U. S. at 48. In sum, it is Minor's claim that his answers on the form would tend to prove that he supplied narcotic drugs outside the original stamped package (outlawed by 26 U. S. C. § 4704), and presumably that it follows that he failed to register with the Treasury Department as required by 26 U. S. C. § 4722, and that he possessed narcotic drugs in violation of 26 U. S. C. § 4724(c).<sup>7</sup>

The government retorts: "It is sufficient answer that appellant was [indicted under section 4705(a) and was] not charged with violation of these other provisions." In effect, we are asked to focus solely on § 4705(a), ignore the balance of the statutory scheme and the regulations, and leave the resolution of possible self-incrimination claims under those provisions to another day. But, the Supreme Court has informed us that we must give appropriate consideration in our analysis to closely related statutory requirements in determining whether there exists a "real and appreciable," *Reg. v. Boyes*, 1 B & S 311, 330; *Brown v. Walker*, 161 U. S. 591, 599-600 (1896), hazard of incrimination:

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<sup>6</sup> As originally enacted in 1914, these provisions were contained in the same paragraph as present section 4705(a). See 38 Stat. 787.

<sup>7</sup> Section 4704 provides, in relevant part, that "it shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package."

Section 4724(c) provides, in relevant part, that "it shall be unlawful for any person who has not registered and paid the special tax . . . to have in his possession or under his control narcotic drugs."

"We must conclude that here, as in *Albertson* [v. S. A. C. B., *supra*], the validity under the Constitution of prosecutions for wilful failure to pay the excise tax may properly be determined only after assessment of the hazards of incrimination which would result from 'literal and full compliance' with all statutory requirements." *Grosso v. United States*, *supra*, 390 U. S. at 65.

Nevertheless, we are of the view that the issue we are called upon to resolve is significantly different from those before the Supreme Court in *Marchetti*, *Grosso* and *Haynes* and we conclude that Minor's conviction must be affirmed because compliance with § 4705(a) would not have subjected him to the risk of self-incrimination. If § 4705(a) serves a distinct Congressional purpose and can be meaningfully enforced apart from the sections which allegedly pose the incrimination dilemma, it is incumbent upon us to consider it as an isolated enactment in order to avoid the adjudication of a serious constitutional issue. See, e.g., *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (concurring opinion of Mr. Justice Brandeis), cited in *Haynes v. United States*, *supra*, 390 U. S. at 92. Moreover, Congress has specifically provided that:

"If any provision of this title [title 26], or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application to other persons or circumstances, shall not be affected thereby." 26 U. S. C. § 7852(a).

And, we believe that § 4705(a) serves an important function within the statutory scheme even if, which we do not decide, the seller cannot be forced to fill out the form and to keep it available for government inspection. Requiring that sales be made only to persons who have acquired and are able to produce Treasury forms ensures that narcotic drugs will not be transferred to unauthorized purchasers or to those who are likely to evade the payment of taxes imposed under 26 U. S. C. §§ 4701 and 4721. See *Nigro v. United States*, 276 U. S. 332,

346-47 (1928). Compare *United States v. Hymowitz*, 196 F. 2d 819, 821 (2d Cir. 1952) (discussing what is now subdivision (g) of section 4705). The Court's statement in *Nigro* is quite relevant:

"Congress intended not only to punish sales without registration . . . but also to punish them without order forms from the purchaser to the seller, as a means of making it difficult for the unregistered seller to carry through his unlawful sales to those who could not get order forms." 276 U. S. at 350.

Although the Court in that case focused upon potential sales by unregistered sellers, its analysis is equally apposite to sales by those legally in possession of narcotics. In both situations, § 4705(a) ensures that narcotics do not fall into the hands of those who, for one reason or another, cannot satisfy the registration requirements of § 4722. And, a seller's failure to fill out or retain the order form in no way affects the statutory purpose of limiting sales to purchasers who are duly authorized to deal in narcotic drugs. Thus, we conclude as the Court did in *Nigro* that: "To punish him [the seller] for this misuse [or, in the instant case, lack of use] of the order form is not to punish him for not recording his own crime." 276 U. S. at 350-51.

We recognize, of course, that in *Marchetti*, *Grosso* and *Haynes* the Supreme Court refused to sever one statutory provision from another in considering whether the statutory scheme presented a danger of incrimination, but the valid reasons that justified those results are absent here. In *Marchetti* the Court decided that the obligations under the wagering tax statutes to register and pay the occupational tax are "essentially inseparable elements of a single registration procedure" because under settled Treasury practice a payment of the tax would not be accepted unless accompanied by a completed registration form. See 390 U. S. at 42-43. Similarly, in *Grosso* the Court refused to distinguish between the obligation to pay the gambling excise tax and to file the requisite tax return, although the two were separately punishable, be-

cause of government policy to refuse the payment unless submitted with a return. 390 U. S. at 65. In the instant case, as we have already noted, a seller of narcotic drugs is not required to register or in any other way to incriminate himself in order to comply fully with the requirements of § 4705(a). And the discussion of severability in *Haynes* was manifestly concerned with an entirely different problem since the Court merely reasoned that a conviction under the registration clause of 26 U. S. C. § 5851 could not be properly distinguished from a conviction for failure to register firearms as required by 26 U. S. C. § 5841. Since § 5851 specifically rendered illegal the possession of firearms which have not been "registered as required by section 5841" no other conclusion was possible.

In sum, we hold that compliance with § 4705(a) would not have required Minor to risk incriminating himself. Whether any other section of the Internal Revenue Code dealing with trade in narcotics impinges upon the right against self-incrimination is a question we need not decide at this time.

There is a further persuasive distinction between the issue before us and those presented in *Marchetti* and its companion cases. In *Marchetti* and *Grosso* the Court placed great emphasis on the wide prohibition against gambling under both federal and state law, 390 U. S. at 44-48, and stressed that the gambling statutes were directed at a "selective group inherently suspect of criminal activities," 390 U. S. at 57.<sup>\*</sup> The firearms registration statutes before the Court in *Haynes* had the even more apparent purpose of gathering information from possible criminals in order to secure their conviction of various crimes. The Court noted:

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<sup>\*</sup> This provided one ground upon which the Court distinguished the "required records" doctrine of *Shapiro v. United States*, 335 U.S. 1 (1948). The Court also distinguished *Shapiro* on other grounds, but did not believe it necessary to weigh the relative significance of the factors it found present in *Shapiro* but absent in *Marchetti*, *Grosso* and *Haynes*. See 390 U.S. at 57 (*Marchetti*); 390 U.S. at 68 (*Grosso*); 390 U.S. at 98-99 (*Haynes*).

"The registration requirement is thus directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements and who are therefore immediately threatened by criminal prosecutions . . ." 390 U. S. at 96.

Section 4705(a), on the other hand, cannot be said to be directed primarily at those "inherently suspect of criminal activities." Our previous discussion of its purpose was intended to make it evident that it was one section of an important and significant statutory scheme regulating the conduct of a lawful business. While we are not unaware that many have been prosecuted for violating the narcotics provisions of the Internal Revenue Code, we cannot accept Minor's argument that the narcotic drug business consists entirely, or even in the main, of shadowy figures in the underworld passing small glassine bags in dark alleyways. On the contrary, we have been advised by the government that as of December 1966, there were 394,193 persons duly registered under the narcotics laws who were authorized to obtain written order forms from the government and engage legitimately in narcotic drug transactions, and of these only one person was prosecuted during 1966 for a violation. See *Traffic in Opium and Other Dangerous Drugs*, U. S. Treasury Department, Bureau of Narcotics (1966), at pp. 10 and 44. We have also been informed that in that year over 170,000 kilograms of opium and over 260,000 kilograms of coca leaves were imported legally into the United States while only approximately 100 kilograms of narcotic drugs were seized or purchased in the illicit market by federal agents. *Id.* at 43. It would not be factual to say of the narcotics statutes and regulations what the Supreme Court said of other more general tax provisions—that they are "directed at the public at large," see *United States v. Sullivan*, 274 U. S. 259 (1927); *Albertson v. S. A .C. B.*, *supra*, 382 U. S. at 79; it would be equally inaccurate, however, to say, that they are "directed at a highly selective group inherently suspect of criminal activities," *ibid.*

It is not our function to anticipate changes of doctrine and thus render ineffective a vital statutory scheme designed by the Congress to regulate the potentially dangerous traffic in narcotic drugs.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of July one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,  
HON. J. JOSEPH SMITH,  
HON. IRVING R. KAUFMAN,  
*Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

JAMES MINOR, DEFENDANT-APPELLANT

JUDGMENT—July 3, 1968

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO  
Clerk

## SUPREME COURT OF THE UNITED STATES

No. 766, Misc., October Term, 1968

JAMES MINOR, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS AND GRANTING PETITION  
FOR WRIT OF CERTIORARI—June 2, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1473 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN F. DAVIS, CL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 189

ITION NOT PRINTED

JAMES MINOR,

*Petitioner,*

*vs.*

UNITED STATES,

*Respondent.*

ONSE NOT PRINTED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

✓  
✓  
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### ARGUMENT:

Petitioner's Fifth Amendment Right Against Self-Incrimination Is Violated by the Provisions of 26 U.S.C. §4705 and the Regulations Thereunder Which Permit Him to Transfer Heroin Only Pursuant to a Written Order Form and Compel Him, in Connection Therewith, to Reveal Incriminating Information .....	5
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 189

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JAMES MINOR,

*Petitioner,*

*vs.*

UNITED STATES,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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BRIEF FOR PETITIONER

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Opinion Below

The opinion of the Court of Appeals for the Second Circuit (App. 22-31)<sup>1</sup> is reported at 398 F. 2d 511 (1968).

No opinion was rendered by the District Court.

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<sup>1</sup> "App." references are to the separate appendix filed pursuant to Rule 36 of this Court. The appendices to this brief will be cited as "Appendix A," etc.

## **Jurisdiction**

The judgment of the Court of Appeals for the Second Circuit was entered on July 3, 1968 (App. 32). On July 24, 1968, an extension of time to file a petition for writ of certiorari was granted and the petition was filed on August 27, 1968. The petition for writ of certiorari was granted on June 2, 1969 (App. 33).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## **The Constitutional Provisions, Statutes and Regulations Involved**

### **UNITED STATES CONSTITUTION, AMENDMENT V**

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

### **STATUTES**

The text of the statutes involved is set forth in Appendix A. The statutes are 26 U.S.C. §§4701, 4703-05, 4721-22, and 4724.

### **REGULATIONS**

The text of the regulations involved is set forth in Appendix B. The regulations are 26 CFR §§151.141-147, 151.161-167, 151.181, 151.185-190, 151.201, and 151.211.

### Question Presented

Whether the provisions of 26 U.S.C. §4705 and the regulations thereunder prohibiting petitioner from transferring heroin without receipt of a written order form and requiring him, in connection therewith, to reveal incriminating information violate petitioner's right against self-incrimination.

### Statement of the Facts of the Case

Petitioner was charged in a two count indictment (App. 34) with violation of the federal narcotics laws in that on two occasions he sold heroin to an undercover federal narcotics agent (App. 8-10) not pursuant to a written order form (App. 17-18). Petitioner was convicted of both counts and sentenced to concurrent terms of five years in prison.

On appeal to the United States Court of Appeals for the Second Circuit, petitioner challenged the validity of the conviction, arguing that compliance with the order form provisions compelled him to reveal incriminating information in violation of his Fifth Amendment right as that right is interpreted by *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968) and *Haynes v. United States*, 390 U.S. 85 (1968).<sup>2</sup>

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<sup>2</sup> Although no objection on this ground had been taken in the District Court, the Court of Appeals considered the issue on the merits, relying on the decision in *Grosso v. United States*, *supra*, 390 U.S. at 70-71. Further, as was the situation in *Leary v. United States*, 395 U.S. 6, 27 (1969), the trial in this case was begun and concluded, the sentence imposed, and the notice of appeal filed prior to the decisions in *Marchetti*, *Haynes*, and *Grosso*, and the Court of Appeals for the Second Circuit had previously rejected a similar self-incrimination claim in *United States v. Marchetti*, 352 F. 2d 848 (1965).

The Court of Appeals affirmed the judgment on the ground that 26 U.S.C. §4705(a) could be treated separately from the other provisions of §4705 relating to the order form. The Court further found that the statute is not primarily directed at those inherently suspect of criminal activities but is part of the scheme designed to regulate lawful business. For these reasons, the Court held that petitioner's right against self-incrimination was not violated.

### **Summary of Argument**

The narcotic drug order form provisions, set forth in §4705 and the regulations thereunder, must be treated as an integral whole. These provisions violate petitioner's right against self-incrimination because the scheme requires that he act only pursuant to the order form and compels him to record incriminatory information on the form, to retain the form for two years, to keep it available for inspection, and to send a copy to the Treasury Department. Legislative history and judicial treatment of the order form provisions, as well as a meaningful reading of the statute, establish that §4705(a) should not be treated as separable from the remainder of §4705. Since all contacts with heroin are unlawful, the seller of heroin is inherently suspect of criminal violations, and the order form provisions cannot be applied to him without violating his Fifth Amendment rights.

## A R G U M E N T

**Petitioner's Fifth Amendment Right Against Self-Incrimination Is Violated by the Provisions of 26 U.S.C. §4705 and the Regulations Thereunder which Permit Him to Transfer Heroin Only Pursuant to a Written Order Form and Which Compel Him, in Connection Therewith, to Reveal Incriminating Information.**

Petitioner was convicted for transferring heroin other than "in pursuance of a written order form of the person to whom" it was sold in violation of 26 U.S.C. §§4705(a) and 7237(b).<sup>3</sup> As applied to petitioner, the statute is unconstitutional because the order form provisions violate his right against self-incrimination by compelling him to disclose information that creates "real and appreciable . . . hazards of self-incrimination." *Marchetti v. United States*, 390 U.S. 39, 48 (1968); *Leary v. United States*, 395 U.S. 6 (1969); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968).

### A. THE STATUTORY SCHEME REGULATING TRAFFIC IN NARCOTICS.

The statutory scheme of Title 26 and the related provisions of the Code of Federal Regulations provide for an occupation tax and registration, an excise tax, and the order form. Section 4721 requires that every person who imports, manufactures, produces, compounds, or sells either as wholesaler or retailer, deals in, dispenses or gives away narcotic drugs<sup>4</sup> shall pay an annual special

<sup>3</sup> Section 7237(b) is the penalty provision.

<sup>4</sup> Narcotic drug is defined to include opium and its derivatives [§4731(a)], such as heroin. See Maurer & Vogel, *NARCOTICS AND NARCOTICS ADDICTS* 69 (3d ed. 1967). This does not include marijuana.

(occupation) tax, and §4722 requires that each of these people register<sup>5</sup> with the Secretary of the Treasury. See also 26 CFR §151.21.

An excise or commodity tax is imposed by §4701 on all narcotic drugs produced in or imported into the United States, and sold or to be used for consumption. This tax is to be paid by the importer, manufacturer, producer or compounder. However, each time a new compound or derivative is produced (26 CFR §151.121) or a drug is repackaged (26 CFR §151.122) a new tax must be paid. Payment of the tax is evidenced by stamps issued by the Secretary of the Treasury (§4771) on requisition of registered persons (26 CFR §151.130) and affixed to the bottle or container in such a way as to seal it (§4703). It is unlawful to purchase, sell, distribute or dispense narcotics except in or from the original stamped package (§4704) and possession of the package without the stamps is prima facie evidence of guilt.

Section 4705(a) makes it unlawful to sell or transfer narcotics except in pursuance of a written order form<sup>6</sup> presented by the buyer or transferee to the seller. See also 26 CFR §151.141. This order form can be obtained only by persons who have registered and paid the occu-

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<sup>5</sup> Title 26 U.S.C. §4731(c), (d), (e) (1964) and 26 CFR §§151.11 (e), (h); 151.21; 151.41-48 specifically indicate all those who must register. Included, in addition to those listed above, are hospitals, colleges of pharmacy, medical or dental clinics or other institutions, physicians, dentists, veterinary surgeons, or anyone who might legally dispense narcotics to patients, and chemists.

<sup>6</sup> Exceptions are listed in §4705(b) and (c). They are the dispensing of narcotics by a physician to a patient, the dispensing of narcotics pursuant to a prescription of a physician, the exporting of narcotics, and the transfer of narcotics to agents of any government body buying for use by government agencies.

pation tax under §§4721 and 4722 [§4705(f); 26 CFR §151.142].

Order forms are issued in triplicate (26 CFR §151.161) to prospective purchasers or transferees who are registered (26 CFR §151.142) upon the filing of an application (26 CFR §151.143). When a purchaser desires to buy narcotics, he must fill in the date of the order, fill in the items and amount ordered and sign the form (26 CFR §§151.163, 151.167). The original and the triplicate are then given to the vendor or transferor who is to supply the narcotics in compliance with the order (26 CFR §151.161). It is stated in 26 CFR §151.181 that only registered importers, manufacturers, producers, compounders or wholesale dealers can supply narcotics pursuant to such an order form.<sup>7</sup>

The transferor enters upon the original and triplicate form, both of which are in his possession, the number and size of the packages furnished on each item and the date on which the order is filled:

"A notation, covering each shipment, showing the actual quantities supplied and the date of delivery, shall be made by the vendor on the original and triplicate and by the vendee on the duplicate."

#### 26 CFR §151.185

The order form itself (Appendix C) also directs the vendor to make these entries.

Every person who accepts an order form and who makes the transfer must keep the order form for 2 years and must make it accessible for inspection by agents of any

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<sup>7</sup> As to the validity of this regulation, see, *infra*, footnote 11.

state or local government enforcing narcotics laws [§§4705 (d), 4773; 26 CFR §§151.201, 151.479(b)]. The vendor is required to send the triplicate to the regional director of the Internal Revenue Service of the district in which the vendor is located [26 CFR §§151.201, 151.11(d)].

The order form itself is addressed to the vendor, and his name and address is to be inserted on the form. Neither the statutes nor the regulations make it clear whose obligation it is to fill in the vendor's name and address in the spaces provided. Also, it is not specified when this information must be placed on the form, except that it is apparent that it must be set forth prior to sending the form to the Secretary of the Treasury.\*

**B. THE INFORMATION THAT PETITIONER WAS REQUIRED TO PLACE ON THE ORDER FORM WAS SELF-INCRIMINATORY.**

If petitioner had complied with the order form procedure required by the statute and regulations, he would have incriminated himself because of the entries that he, in his position as the vendor, was obliged to make on the order form. He was required to state the amount of narcotics he transferred and to furnish the date on which the transfer took place. Thus, whether petitioner himself or his vendee had to put petitioner's name on the form, the form would have revealed petitioner's identity and he, himself, would have supplied the remaining incriminatory information specifically admitting his possession of heroin. Admission of possession would have established a prima facie violation of §4704(a) (possession of narcotics out-

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\* If it is the vendor who has to insert his name on the form, the time at which this has to be done does not affect the self-incriminatory nature of the information. *Marchetti v. United States, supra*, 390 U.S. at 52-53.

side of the original stamped package) and 21 U.S.C. §§173-4 (unlawful importation of narcotics). Further, where the sale involved interstate commerce, the vendor would also have acknowledged violation of §4724(b). In addition to federal controls over narcotics, every state prohibits any dealing with or possession of narcotics, unless the person is properly licensed.\* The New York statutes are most relevant here since the evidence showed the transfer occurred in New York. Section 3305 of the N. Y. Public Health Law (McKinney 1954), which is the same as §2 of the Uniform Narcotic Drug Act, makes it unlawful for any person to manufacture, possess, control, sell, prescribe, administer, dispense or compound any narcotic drug except as authorized. Further, N. Y. Penal Law §220.15 (McKinney 1967) makes it a felony to possess heroin in an amount more than  $\frac{1}{8}$  of an ounce and all other narcotic drugs in an amount more than  $\frac{1}{2}$  ounce. Since the order form would have been available to state narcotics officials, from it they could have ascertained, not only that petitioner had been in possession of narcotics, but the quantity he had possessed.

By complying with the requirements relating to the form, petitioner would have supplied "a significant link in the chain of evidence tending to establish his guilt" (*Marchetti v. United States, supra*, 390 U.S. at 48) in prosecutions pursuant to both federal and state statutes, and he would

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\* All states and the District of Columbia have statutes prohibiting possession of narcotic drugs. Thirty-eight have adopted Section 2 of the Uniform Narcotic Drug Act, 9B Uniform Laws Ann. 423 (1966). Section 1(14) of the Act, 9B Uniform Laws Ann. 417, defines narcotic drug as any drug the importation, exportation, or possession of which is regulated by federal narcotics laws on the date of the transaction involved.

have been exposed to the risk of self-incrimination within the meaning of *Leary, Marchetti, Grosso and Haynes*.

The reasoning of *Leary v. United States, supra*, is particularly appropriate to this case. In *Leary*, the Court rejected the government's position that an unregistered applicant for an order form who attempts to pay the transfer tax under §4741 could not get the form and therefore would not reveal incriminating information. The Court stated that in the course of paying the tax necessary to transfer marijuana in accord with §4741, the unregistered buyer<sup>10</sup> had to reveal he was in violation of other statutes. Section 4705, like §4741, is applicable to all sales, whether the seller is permitted to register under §4722 or not. *Nigro v. United States*, 276 U.S. 332 (1928).<sup>11</sup> Thus, in the course of following the order form procedures required to make a transfer of narcotics in accord with §4705, the unregistered seller is forced to provide information revealing violations of other statutes.

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<sup>10</sup> As noted in *Leary*, the purchaser of narcotics can obtain the form only if he is registered, while a purchaser of marijuana can obtain the form even if he is unregistered by paying an additional fee. 395 U.S. at 21-22.

<sup>11</sup> It is stated in 26 CFR §151.181 that an order can be filled only by a person who is registered. This regulation does not appear in the first regulations, issued in 1915. T.D. 2126, 17 Treas. Dec. Int. Rev. 19 (1916). It appears in different language in the 1919 revised regulations: "The order forms are intended solely for the transfer of narcotic drugs and preparations from one registered person to another. They must not in any case be used as prescriptions." Int. Rev. Reg. No. 35, Art. 107 (1919), compiled in 4 Fox, Int. Rev. Regs., No. 35 at 48. To the extent that this regulation is in conflict with the language and intent of §4705 it is invalid. *Leary v. United States, supra*, 395 U.S. at 23-25.

**C. SECTION 4705(a) MUST BE CONSTRUED IN CONJUNCTION WITH THE REMAINDER OF §4705 AND THE REGULATORY PROVISIONS RELATING TO THE ORDER FORM.**

The Court of Appeals sustained petitioner's judgment of conviction by crediting the government's argument that §4705(a) alone does not require the disclosure of information by the seller. The Court held that §4705(a) should be construed independently of the provisions requiring that information be disclosed and recorded, and that the form be filed and held for inspection. The assumption of the Court of Appeals was that §4705(a) was separable from the other provisions because it served an independent congressional purpose, ensuring

"that narcotic drugs will not be transferred to unauthorized purchasers or to those who are likely to evade the payment of taxes imposed under 26 U.S.C. §§4701 and 4721."

398 F. 2d 511, 515.<sup>12</sup>

The Court's holding is not consistent with the legislative and judicial history of the statute. These sources establish that §4705(a) was intended to be considered together with the other provisions of §4705 that require information be given on the order form and that the form be filed and available for inspection.

The Harrison Narcotics Act of 1914, 38 Stat. 785 (1914), including what is now §4705, was passed after the meetings

<sup>12</sup> After the Court of Appeals determined that §4705(a) should be treated *in vacuo*, it concluded that any danger of self-incrimination fell only upon the purchaser who applied for the order form from the Treasury. Therefore, since the right was personal, petitioner's rights were not violated. This is a spurious issue if §4705 is treated as an entity for petitioner himself must place incriminating information on the form.

of the International Opium Commission in 1911 and after the signing of the Hague Convention of January 23, 1912.<sup>13</sup> The report of the American delegation to the 1911 meeting indicates the broad purposes intended for any scheme of internal control of narcotics in the United States. After detailing the facts as to the increased use of opium and cocaine for non-medical purposes, and discussing the Opium Exclusion Act of 1909 (35 Stat. 614, ch. 100, §2) which limited the importation of opium, the report states:

"In the practical working of this [Opium Exclusion] Act and regulations issued under it, legally imported opium is almost immediately lost sight of on leaving the customhouse; for, although the importer may import in good faith and sell to the manufacturer or jobber in equally good faith, it is not possible for any of them to guarantee that the ultimate receiver or seller of the drug in interstate commerce is handling it for strictly medical purposes. . . . A proposed bill to supplement [sic] this defect in the act by placing the interstate traffic in opium and other habit forming drugs under federal control will be submitted." [Emphasis added.]<sup>14</sup>

The legislative reports on the bill which subsequently became the Harrison Act took the same position. The report of the Senate Finance Committee (which adopted in full the report of the House of Representative Committee on Ways and Means) shows that Congress recognized the

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<sup>13</sup> Note, *Narcotics Regulation*, 62 Yale L.J. 751, 760, 761 n. 61 (1953).

<sup>14</sup> THE INTERNATIONAL OPIUM COMMISSION AND THE OPIUM PROBLEM IN THE UNITED STATES, S. Doc. No. 377, 61st Cong., 2d Sess., 55 (1910).

significance of the problem and chose to use its taxing power for the purpose of controlling the flow of narcotics and aiding the states in the enforcement of their narcotics control statutes:

"... There is a real and, one might say, even desperate need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and to aid both directly and indirectly the states more effectually to enforce their police laws designed to restrict narcotics to legitimate medical channels.

. . . . .

The different States of the Union, by pharmacy laws, made most strenuous efforts to prevent the indiscriminate sales of narcotics—most of the States requiring that these drugs be sold only upon the prescription of physicians. But these laws have been ineffective because of the failure of the Federal Government to control the importation and interstate traffic in the drugs. It is the unanimous view of the State, Territorial, and municipal officials charged with police laws aimed at the traffic in narcotics that these laws will remain ineffective to a large extent until the Federal Government acts in support of them.

It may be said that no individual has ever represented to the Committee on Ways and Means that the present extensive traffic in narcotics should be allowed to continue. The opinion of in fact everyone except illicit dealers is that the traffic ought to be greatly diminished, and that narcotics should be confined to legitimate medical channels. The only question at issue has been how best to do it. During the past five years

the United States Opium Commission has made a thorough canvass of [those who deal in and consume narcotics and State officials] . . . and as a result and in conjunction with a committee of representatives of the Department of State, the Treasury Department, and the Department of Justice, it has been decided by them that only by customs law and by the exertion of the Federal taxing power can the desired end be accomplished. In that opinion your committee concur."

S. Doc. No. 258, 63rd Cong., 2nd Sess., 2, 4 (1914).

The occupation tax and registration requirements (now §§4721 and 4722) were enacted as §1 of the Harrison Act; the order form provision was §2. In addition to requiring payment of a tax and registration, §1 prohibited all activities involving narcotics without registration. This criminal provision apparently was intended by Congress to apply to all persons, even those who were not eligible to register.<sup>15</sup> The order form provisions, substantively unchanged to the present, were part of the original legislation passed to control transactions in narcotics through taxation, including criminal provisions. The direction that the form be retained for two years by both parties, and available for inspection was part of the original §2.<sup>16</sup>

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<sup>15</sup> In *United States v. Jin Fuy Moy*, 241 U.S. 304 (1916), it was held that the criminal provision of §1 applied only to those who were eligible to register but who had not done so. Congress was concerned that the decision weakened the effect of §1 [H.R. Doc. No. 767, 65th Cong., 2nd Sess., 56 (1918)] because no punishment was provided for illegal transferees who were not required to register. To correct this, the excise (commodity) tax applicable to all transactions was added by the Revenue Act of 1918, ch. 18, Title X, §1006, 40 Stat. 1130 (now §4701).

<sup>16</sup> Except for the list of those transactions which could be carried out without the order form, Section 2 of the Harrison Act, which

Article 16 of the original regulations issued by the Treasury Department to administer the Harrison Act states:

"It will be the duty of agents and other inspecting officers appointed under the provisions of section 10 of the act named to visit at irregular intervals the premises of all persons, firms, or companies registering under said act, or where they have reason to believe drugs of the character defined are stored, and . . . they will, under the authority conferred by sections 2 and 5 of the act, inspect and, when necessary, verify such records, orders, prescriptions, statements, or returns made or received, and they will at once report for prosecution any violations of the law discovered by them."

T.D. 2126, 17 Treas. Dec. Int. Rev., *supra*, at 29.

The 1919 revised regulations state the purpose of the order form to be of similar import:

"Art. 100. Purpose of order forms.—Order forms are required to be used so that transfers of narcotic drugs from one person to another may be traced and the proper person held responsible in case of their misuse."

4 Fox, Int. Rev. Regs., No. 35, at 47.

Thus, the intent of Congress and the Treasury Department to establish the order form as a record-keeping device to assist in the enforcement of the occupation tax and the

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included both the order form requirement now found in §4705(a) and the retention and inspection requirements now found in §4705 (d) and (e) was enacted without subdivisions.

related criminal penalties is manifest. After 1919, the form served the same purpose with respect to the excise (commodity) tax. Further, as a record-keeping tool, it directly aided the states in the enforcement of their narcotics legislation, fulfilling Congress' specific intent. Only if all the provisions are interpreted as a whole are the record-keeping and inspection provisions meaningful. Congress' clear statement as to the purpose of the statute, as well as the language and form of the original provisions, establishes that §4705(a) cannot be treated as a severable sub-section.

While Congress viewed the Harrison Act as a measure to control narcotics traffic, courts have been concerned with it as a revenue statute, upon which status its constitutionality was thought to be dependent.<sup>17</sup> Since the order form provision is not in itself a taxing measure, this Court consistently held that it was integrally connected with the other sections of the Act as a measure to enforce payment and collection of the tax, or as a means of disclosing its evasion. The Court has thus treated all aspects of the order form requirement, including its receipt, completion and retention for inspection, as part of a single enforcement tool.

In *United States v. Doremus*, 249 U.S. 86 (1919), the defendant, a registered physician, was charged with a sale of heroin not in pursuance of a written order form, and not in the regular course of his professional practice (an exception to the order form requirement). The order form provision was challenged and held unconstitutional by the district court as not being a revenue measure. This Court reversed the decision stating:

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<sup>17</sup> It was held not to be an exercise of the treaty-making power. *United States v. Jin Fuey Moy*, *supra*, 241 U.S. at 401.

"That Congress might levy an excise tax upon such dealers and others who are named in §1 of the act cannot be successfully disputed. The provisions of §2 [§4705], to which we have referred, aim to confine sales to registered dealers and to those dispensing drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic above-board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers, and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Amerus [the recipient of the narcotics], being, as the indictment charges, an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax; at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

"We cannot agree with the contention that the provisions of §2, controlling dispositions of drugs in the ways described, can have nothing to do with facilitating the collection of the revenue . . . ."

In sustaining the order form provision, this Court essentially adopted the argument of the government that the order form provision was required in narcotics dealings "so as to secure that both [the transferor and transferee] should so register and pay the tax." 249 U.S. at 87.

In *United States v. Balint*, 258 U.S. 250 (1922), the issue was whether the order form provision had to be complied with although the seller did not know the substance involved in the transaction was a narcotic. The Court again held that the order form provision was a method of enforcing the relevant tax statutes:

"The Narcotic Act has been held by this court to be a taxing act with the incidental purpose of minimizing the spread of addiction to the use of poisonous and demoralizing drugs. [Citations omitted] . . . It is very evident from a reading of it [§2] that the emphasis of the section is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers of the Government and that it *merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic*. Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him." [Emphasis added.]

258 U.S. at 253-4.

The relationship is fully explored in *Nigro v. United States*, *supra*. There, the unregistered transferor sold to the buyer without a written order form. The issue was

whether the written order form provision applied to an unregistered seller who was not required or permitted to register. Concluding that the provision applied to all sellers, the Court stated that, in order to sustain the statute

“Everything in the construction of §2 must be regarded as directed toward the collection of the taxes imposed in §1 and the prevention of evasion by persons subject to the tax. If the words cannot be read as reasonably serving such a purpose, §2 cannot be supported.”

276 U.S. at 341-2.

Rejecting an argument that an unregistered seller would be guilty of two crimes if the order form provision applied to him, the Court went on to state that a second reasonable restriction was justifiable as long as

“such a restriction should be fairly adapted to obstruct the successful accomplishment of the main crime, or furnish means of detecting the guilty person . . . .

“It would seem to be admissible and likewise, in a law seeking to impose taxes for the sale of an elusive object, to require conformity to a prescribed method of sale and delivery calculated to disclose or make more difficult any escape from the tax. If this may be done, any departure from the steps enjoined may be punished, and added penalties may be fixed for successive omissions, but all for the one ultimate purpose of making it difficult to sell opium or other narcotics without registering or paying the tax.”

276 U.S. at 344-5.

The Court then referred to the subsequently added excise (commodity) tax and stated that the order form provision should "apply to all persons so as to be helpful in promoting the detection of evasion from the added tax imposed under the new §1" (276 U.S. at 347) and concluded by saying:

"The order form is not a mere record of a past transaction—it is a certificate of legality of the transaction being carried on, or else it is a means of discovering the illegality and is useful for the latter purpose."

276 U.S. at 351.

An examination of the statutes and regulations indicates that, as this Court said in *Grosso, supra*, 390 U.S. at 65, there is nothing in them that contemplates the receipt of the order form and the supplying of narcotics, without the subsequent filing of the form with the requested information written thereon. The form itself is prepared by the Secretary of the Treasury [§4705(f)], and it requires that the vendor insert information concerning the sale and, as is clear from the reverse side, directs that the supplier of the drugs send the triplicate to the district supervisor. Further, the reverse side of the original and triplicate forms are used to endorse the order over to another transferor if the first transferor cannot supply the items requested by the transferee (26 CFR §151.189). The endorsement shows the name and address of the new transferor, as well as the signature, registry number and complete address of the original transferor, whose name is apparently already on the front of the form.

These details of the record-keeping aspect of the order form demonstrate that this function cannot be separated

from its receipt at the time of the sale. It does not matter whether the purpose of the order form requirement is viewed as a necessary aid to collecting and enforcing federal taxes, discovering their evasion, assisting states in the enforcement of their narcotic provisions, or controlling the flow of narcotics through criminal penalties. Any of these purposes would necessitate compliance with the completion, record-keeping and filing aspects of the order form requirement.<sup>18</sup>

The position taken in *Grosso v. United States, supra*, was that the validity of a criminal prosecution for failure to pay an excise tax under the gambling provisions of Title 26 could be determined only after the hazards of incrimination were considered in light of "literal and full compliance with all statutory requirements." 390 U.S. at 65. A similar evaluation is required here and demands a reversal of the judgment.

**D. THE ORDER FORM PROVISIONS, AS APPLIED TO PETITIONER, ARE DIRECTED TO A GROUP INHERENTLY SUSPECT OF CRIMINAL ACTIVITIES.**

The Court of Appeals also held that the order form provision was not in violation of the Fifth Amendment because it was not directed to a group of persons inherently sus-

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<sup>18</sup> The purpose and importance of the order form as a record-keeping device is highlighted by a 1948 change in the Code of Federal Regulations. Initially, the order forms were issued in duplicate—one for the vendee and one for the vendor. The change required that they be prepared in triplicate, with one copy sent to the Internal Revenue Service "in order to provide a more prompt check of purchases and sales of narcotic drugs . . . ." 14 Fed. Reg. 519 (1949).

pect of criminal activities.<sup>19</sup> In support of its position, the Court of Appeals referred to statistics reflecting the volume of legitimate business dealings in narcotic drugs.

This holding is incorrect because petitioner was accused of transferring heroin and there is no legitimate trade in that drug. All contacts with heroin are unlawful under federal law. It is illegal to grow opium poppies without a license<sup>20</sup> (which license apparently has never been issued<sup>21</sup>); to import heroin into the United States (the statute permits importation of only crude opium);<sup>22</sup> to manufacture heroin in the United States;<sup>23</sup> and to possess heroin.<sup>24</sup> See also U.S. Treas. Dept., Bureau of Narcotics, *TRAFFIC IN OPIUM AND OTHER DANGEROUS DRUGS* 11 (1959).

The purpose of these statutes is clearly articulated by Congress:

“Heroin, the most addicting of all narcotic drugs, should be completely outlawed in the United States as is in

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<sup>19</sup> Direction of the form to those inherently suspect of criminal activities has been found necessary by this Court to avoid the application of the required records doctrine of *Shapiro v. United States*, 335 U.S. 1 (1948). See *Marchetti v. United States*, *supra*, 390 U.S. at 55-57. Two other elements of the required records doctrine were treated minimally in *Marchetti* (390 U.S. at 57), *Grosso* (390 U.S. at 68-69) and *Haynes* (390 U.S. at 98-99), and not at all in *Leary*. In any case, those elements are not present here. The statute does not require that petitioner keep records that he customarily kept, and the forms have no more “public aspects” than do the registration forms in *Marchetti*, *Haynes*, and *Grosso*.

<sup>20</sup> 21 U.S.C. §188.

<sup>21</sup> The President's Advisory Commission on Narcotic and Drug Abuse, *Final Report*, 34 (1963).

<sup>22</sup> 21 U.S.C. §173.

<sup>23</sup> *Id.*

<sup>24</sup> 18 U.S.C. §1402.

most nations of the world. Heroin has no medical value that is not better served by legitimate drugs and, because of its addicting qualities, it is not used in the practice of medicine in the United States. It is now unlawful to import or to produce heroin in this country, but there are some small supplies of heroin legally held by hospitals and druggists. This should be surrendered at fair compensation so that the drug will be completely outlawed in our country."

S. Rep. No. 1997, 84th Cong., 2d Sess., 7 (1956).

In light of this absolute prohibition on heroin, the application of the order form provisions to heroin transactions directs the form at a "group inherently suspect of criminal activities," and must result in self-incrimination.

The statistics cited by the Court of Appeals to justify its conclusion that the order form provisions regulate legitimate business have no significance, when, as here, heroin is the narcotic involved.

Moreover, the situation here is comparable to that in *Leary v. United States, supra*. At the time Leary failed to register and obtain the order form for marijuana, it was illegal, with certain exceptions, in most states to possess marijuana. The Court found that, of those who were permitted under state law to possess marijuana, most were required under federal law to register and pay the occupation tax, and the remainder were exempt from federal registration. Further, the Court found that, due to the heavy criminal penalties involved, it was extremely unlikely that those who were required to register under federal law would fail to do so. The Court concluded that

those who might legally possess marijuana under state law were "virtually certain" to be registered under federal law or exempt, and thus also might legally possess marijuana under federal law. Therefore

"the class of purchasers who were both unregistered and obliged to register to obtain an order form constituted 'a select group inherently suspect of criminal activities.'"

*Leary v. United States, supra*, 395 U.S. at 18.

The same reasoning is applicable to this case because under New York law, the exceptions to the prohibition on the possession of narcotics are (1) manufacturers, processors, growers, cultivators, wholesalers;<sup>25</sup> (2) hospitals, laboratories, and dispensaries;<sup>26</sup> (3) physicians, dentists, veterinarians, those in charge of hospitals or laboratories, and government agents;<sup>27</sup> (4) licensed pharmacists;<sup>28</sup> (5) persons receiving narcotics from a physician, dentist, druggist, veterinarian.<sup>29</sup>

A comparison of the New York statute with the federal statutes and regulations defining those who must register or who are exempt from registration<sup>30</sup> shows that substan-

<sup>25</sup> N. Y. Public Health Law §§3310, 3301 (19)-(22) (McKinney Supp. 1968-9).

<sup>26</sup> N. Y. Public Health Law §§3311, 3301 (23)-(28) (McKinney Supp. 1968-9).

<sup>27</sup> N. Y. Public Health Law §3330 (McKinney 1954); §3301 (11)-(15) (McKinney Supp. 1968-9).

<sup>28</sup> N. Y. Public Health Law §§3320, 3301 (16)-(17) (McKinney Supp. 1968-9).

<sup>29</sup> N. Y. Public Health Law §3331(1) (McKinney Supp. 1968-9).

<sup>30</sup> See footnote 5, *supra*, and related text.

tially the same persons must register under both. Applying the reasoning of *Leary v. United States, supra*, it is fair to assume that those who might legally possess narcotics were "virtually certain" to be registered or exempt. Thus, compliance with the order form provisions would have "required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group" (395 U.S. at 18) who were both unregistered and obliged to use the order form provisions.

### Conclusion

For the above-stated reasons, the judgment below must be reversed.

Respectfully submitted,

PHYLIS SKLOOT BAMBERGER  
WILLIAM E. HELLERSTEIN  
*Counsel for Petitioner*

APPENDICES

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## APPENDIX A

### Statutes Involved

#### §4701. Imposition of tax

(a) Rate.—There shall be imposed an internal revenue tax upon narcotic drugs, produced in or imported into the United States, and sold, or removed for consumption or sale, at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on narcotic drugs.

(b) By whom paid.—The tax imposed by subsection (a) shall be paid by the importer, manufacturer, producer, or compounder. Aug. 16, 1954, c. 736, 68A Stat. 549.

#### §4703. Affixing of stamps

The stamps provided in section 4771(a) (1) for narcotic drugs shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof. Aug. 16, 1954, c. 736, 68A Stat. 550.

#### §4704. Packages

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found. Aug. 16, 1954, c. 736, 68A Stat. 550; Aug. 31, 1954, c. 1147, § 8, 68 Stat. 1004.

#### §4705. Order forms

(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic

drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(c) Other exceptions.—Nothing contained in this section, section 4735, or section 4774 shall apply—

(1) Use of drugs in professional practice.—To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722, in the course of his professional practice only: *Provided*, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, veterinary surgeon, or other practitioner shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 4773.

(2) Prescriptions.—(A) To the sale, dispensing, or distribution of narcotic drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722: *Provided, however*, That (i) such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner who shall have issued the same; (ii) that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily

accessible to inspection by the officers, agents, employees, and officials mentioned in section 4773.

(B) In lieu of a written prescription for such narcotic drugs or compounds of a narcotic drug which the Secretary or his delegate, in his discretion (after considering any views expressed on the subject by the Surgeon General, United States Public Health Service; the Commissioner, United States Food and Drug Administration; the respective heads of State narcotic law enforcement agencies; and the respective secretaries of national associations representing (i) narcotic drug manufacturers, (ii) physicians, and (iii) pharmacists), shall find and by regulation designate to possess relatively little or no addiction liability, the sale, dispensing, or distribution may be made by a dealer to a consumer upon oral prescription of a duly registered physician, dentist, veterinary surgeon, or other practitioner, which oral prescription is reduced promptly to writing, and the writing filed and preserved by the dealer for a period of two years from the date on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 4773. In issuing an oral prescription, the prescriber shall furnish the dealer with the same information as is required by law or regulation in case of a written prescription for narcotic drugs or compounds of a narcotic drug except for the written signature of the prescriber, and the dealer who fills such prescription shall be required to inscribe such information on the written record of the prescription made, filed and preserved by him, and shall inscribe on the label of the container of the narcotic drug or compound of a narcotic drug the same information as is required in filling a written prescription. An oral prescription shall not be refilled.

(C) If the Secretary or his delegate shall subsequently determine that a narcotic drug or a compound of a narcotic drug, to which the oral prescription procedure described in the preceding subparagraph has been made applicable, possesses a degree of drug addiction liability that, in his opinion, results in abusive use of such procedure, he shall by regulation publish the determination in the Federal Register. The determination shall be final, and after the expiration of a period of six months from the date of its publication, the oral prescription procedure described in the preceding subparagraph shall cease to apply to the particular narcotic drug or to the particular compound of a narcotic drug which is the subject of the determination.

(3) Exportation.—To the sale, exportation, shipment, or delivery of narcotic drugs by any person within the United States or any Territory or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State.

(4) Government and State officials.—To the sale, barter, exchange, or giving away of narcotic drugs to any officer of the United States Government or of any State, Territorial, district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, Territorial, district, county, or municipal or insular hospitals or prisons.

(d) Preservation.—Every person who shall accept any order required under subsection (a), and in pursuance

thereof shall sell, barter, exchange, or give away narcotic drugs, shall preserve such order for a period of 2 years in such a way as to be readily accessible to inspection by any officer or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 4773.

(e) Duplicates.—Every person who shall give an order as provided in this section to any other person for narcotic drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Secretary or his delegate, and in case of the acceptance of such order shall preserve such duplicate for said period of 2 years in such a way as to be readily accessible to inspection by the officers, employees, and officials mentioned in section 4773.

(f) Supply.—The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section, and shall cause the same to be distributed to each internal revenue district for sale to those persons who shall have registered and paid the special tax as required by sections 4722 and 4721; and he shall require that the same be sold only to persons who have registered and paid the special tax as required by said sections. The price at which such forms shall be sold shall be fixed by the Secretary or his delegate but shall not exceed the sum of \$1 per hundred. The Secretary or his delegate shall cause to be kept accounts of the number of such forms sold, the names of the purchasers, and the number of such forms sold to each of such purchasers. Whenever any of such forms are sold, the Secretary or his delegate shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring narcotic drugs, or furnish any of the forms bearing the name of such purchaser to

any person with intent thereby to procure the shipment or delivery of narcotic drugs.

(g) Unlawful use.—It shall be unlawful for any person to obtain by means of said order forms narcotic drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession. Aug. 16, 1954, c. 736, 68A Stat. 551; Aug. 31, 1954, c. 1147, §§6, 7, 68 Stat. 1003; Aug. 1, 1956, c. 852, §12(c), 70 Stat. 909.

#### §4721. Imposition of tax

On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away narcotic drugs shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30.

(1) Importers, manufacturers, or producers.—Importers, manufacturers, producers, or compounders, lawfully entitled to import, manufacture, produce, or compound narcotic drugs, \$24 a year;

(2) Wholesale dealers.—Wholesale dealers, lawfully entitled to sell and deal in narcotic drugs, \$12 a year;

(3) Retail dealers.—Retail dealers, lawfully entitled to sell and deal in narcotic drugs, \$3 a year;

(4) Physicians, dentists, veterinary surgeons, and other practitioners.—Physicians, dentists, veterinary surgeons, and other practitioners, lawfully entitled to distribute, dispense, give away, or administer narcotic drugs to patients upon whom they in the course of their professional practice are in attendance, \$1 a year or fraction thereof during which they engage in any of such activities;

(5) Persons engaged in research, instruction, or analysis.—Persons not registered as an importer, manufacturer, producer, or compounder and lawfully entitled to obtain and use in a laboratory narcotic drugs for the purpose of research, instruction, or analysis shall pay \$1 a year; but such persons shall keep such special records relating to receipt, disposal, and stocks on hand of narcotic drugs as the Secretary or his delegate may by regulation require. Such special records shall be open at all times to the inspection of any duly authorized officer or employee of the Treasury Department.

(6) Persons not otherwise taxed.—

For a tax of \$1 a year on persons not otherwise taxed, dispensing preparations and remedies of limited narcotic content, see section 4702(a).

Aug. 16, 1954, c. 736, 68A Stat. 554.

#### §4722. Registration

On or before July 1 of each year every person who engages in any of the activities enumerated in section 4721 shall register with the Secretary or his delegate his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration. Aug. 16, 1954, c. 736, 68A Stat. 555.

#### §4724. Unlawful acts in case of failure to register and pay special tax

(a) Trafficking.—It shall be unlawful for any person required to register under the provisions of this subpart or section 4702(a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away narcotic drugs without having registered and paid the special tax imposed by this subpart or section 4702(a).

(b) Transportation.—Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, or deliver narcotic drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, into any other State or Territory or the District of Columbia, or any insular possession of the United States. Nothing contained in this subsection shall apply—

(1) to any person who shall have registered and paid the special tax as required by sections 4721 and 4722;

(2) to common carriers engaged in transporting narcotic drugs;

(3) to any employee acting within the scope of his employment for any person who shall have registered and paid the special tax as required by sections 4721 and 4722, or to any contract carrier or other agent acting within the scope of his agency for such registered person;

(4) to any person who shall deliver any such drug which has been prescribed or dispensed by a physician, dentist, veterinarian, or other practitioner required to register under the terms of this subpart or section 4702(a) and employed to prescribe for the particular patient receiving such drug;

(5) to any person carrying any narcotic drug or compound of a narcotic drug which has been obtained by the person from a registered dealer in pursuance of a written or oral prescription referred to in section 4705(c) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722, if the bottle or other container in which such drug or compound of a narcotic drug is carried bears the name and regis-

try number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person issuing such prescription;

(6) to any person carrying any such drug which has been obtained by the person as a patient from a registered physician, dentist, or other practitioner in the course of his professional practice if such drug is dispensed to the patient for legitimate medical purposes; or

(7) to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

(c) Possession.—It shall be unlawful for any person who has not registered and paid the special tax provided for by this subpart or section 4702(a) to have in his possession or under his control narcotic drugs; and such possession or control shall be presumptive evidence of a violation of this subsection and subsection (a), and also a violation of the provisions of sections 4721 and 4722: *Provided*, That this subsection shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this subpart or section 4702(a), having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of narcotic drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this subpart or section 4702(a); or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any of said drugs, by reason of his official duties; or to a warehouseman holding possession for a person registered and who has paid the taxes under this subpart and sections 4701 to 4707, inclusive; or to common carriers engaged in trans-

porting such drugs: *Provided further*, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this subpart or sections 4701 to 4707, inclusive; and the burden of proof of any such exemption shall be upon the defendant. Aug. 16, 1954, c. 736, 68 Stat. 555; Aug. 31, 1954, c. 1147, § 10, 68 Stat. 1004.

**APPENDIX B****Code of Federal Regulations****Title 26—Internal Revenue****Subpart E—Order Forms****PROCUREMENT OF ORDER FORMS****§151.141 Written order required.**

Except as otherwise provided, order forms are required for all sales or other disposition of narcotic drugs.

**§151.142 By whom procurable.**

Blank forms may be obtained only by persons who are duly qualified and registered under section 4722 of certified as purchasing exempt officials (see §§151.222 and 151.223) and have legitimate use therefor. Order forms will not be furnished to persons registered in Class V who are not manufacturers.

**§151.143 Manner of procurement.**

A person desiring and entitled to receive order forms should submit requisition on Form 679 to the district director of the internal revenue district in which he is doing business. The order forms are issued in books each containing 10 sets of original, duplicate, and triplicate forms. Blank requisitions, Form 679, may be obtained from the district director and a replacement requisition blank is included in each book of forms. Each requisition shall show the taxpayer's name, address, registry number, and class, and the number of books of order forms desired. Unless the taxpayer is registered in Class I or II, only one book of order forms will be furnished on each requisition. A charge of 10 cents is made for each book of order forms issued to other than exempt officials, and the requisition should be accompanied by remittance of the proper amount in the form of a check, cash, or money order. For procurement of order forms by exempt officials, see §151.224.

#### §151.144 Signing of requisitions.

Generally, requisitions for order forms shall be signed by the same person or persons signing the application for registration (see §151.26). However, they may be signed by another person authorized by power of attorney previously filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature of the persons thereby authorized to sign requisitions for order forms, and shall affirm that the signature so shown is his signature.

#### §151.145 Signatures to be compared.

Upon receipt by the district director of a requisition for order forms, the signature on such requisition shall be compared with that appearing on the application for registration or in the power of attorney (see §151.144). Unless the district director is satisfied that the requisition is authentic, it will not be honored.

#### §151.146 Procedure regarding order forms.

Upon receipt of a properly executed requisition, accompanied by a sum sufficient to cover the cost of the order forms desired, the district director will issue the order forms requested. Before issuing the order forms the district director will cause to be shown thereon in a legible and permanent manner the name, address, registry number, and class number or numbers of the person to whom they are supplied, also the date of issuance and his signature or his name and the initials of the issuing employee.

#### §151.147 Requisitions to be filed.

The district director will stamp each requisition with the date when filled, enter thereon the first and last serial number of the order forms sold in pursuance thereof, and

file all requisitions alphabetically according to the name of the purchaser.

### EXECUTION OF ORDER FORMS

#### §151.161 Execution of forms.

(a) Order forms are issued in triplicate and shall be executed in triplicate. They are arranged to permit the execution of the original, duplicate, and triplicate simultaneously by means of interleaved carbon sheets. The original and the triplicate, together with the intervening carbon sheet, must be furnished to the consignor, but shall not leave the possession of the person executing the order until the duplicate is made.

(b) The attachment of extra sheets to order forms is not permitted. If one order form is not sufficient to include all the items of an order, an additional form or forms shall be used. The order forms are intended solely to cover dispositions of taxable narcotic drugs and preparations to registered persons. They shall not in any case be used as prescriptions.

#### §151.162 Manner of preparation.

(a) The order forms shall become a part of the permanent records of the registrant filling them, and are required by law to be kept available for inspection for a period of two years. The manufacturer or wholesale dealer should insist for his own protection that the order forms be prepared in such manner as to render their subsequent alteration both difficult of accomplishment and easy of detection. Purchasers also should be careful to protect order forms signed by them against subsequent alteration. Official order forms for the purchase of taxable narcotic drugs should therefore be prepared by the use of typewriter, ink, or indelible pencil, and manufacturers and wholesale dealers should return unfilled any order form executed in a less permanent manner.

(b) For filing of requisitions, see §151.147. For regulations relating to filing of order forms, see §§151.201 and 151.202.

**§151.163 Date.**

The full and exact date when the order form is actually made out shall be inserted by the purchaser. Purchasers are also required to enter, in the space provided therefor at the bottom of the form, the number of items ordered. If in any case the number of items has not been so entered by the purchaser, the order form shall be returned for completion before it is filled.

**§151.164 Name and address of purchaser.**

The name, address, registry and class number, and internal revenue district of the purchaser as inserted by the district director shall not be changed by either the purchaser or consignor in any manner whatsoever. The merchandise requested on the form may be sent only to the person designated by the district director and at the location specified by him. The name of the purchaser, as registered with the district director, and as entered by the district director on the form, shall be shown on the first line in the lower right-hand space of the form, except where the form is signed personally by an individual registrant in which event this line may be left blank. The signature of an individual purchaser acting personally, or of an individual acting for a registrant, whether acting under power of attorney or otherwise authorized, shall be entered on the second line of the lower right-hand space.

**§151.165 Signing of order forms.**

(a) Official narcotic order forms shall be signed by the purchasing registrant with ink or indelible pencil. The signature shall be in the same form as on the application for registration.

(b) The signing of such forms merely with a firm, corporate, or trade name, without indication of personal responsibility, is not permissible, but the signature of the person signing the application for registration must appear. However, they may be signed by another person authorized by power of attorney previously filed with and approved by the district director. The power of attorney shall be executed in the same manner as applications for registration, shall show the signature of the person thereby authorized to sign order forms, and shall affirm that the signature so shown is his signature. The signature of the responsible individual may not be printed or stamped on the order form, but must be shown in his own handwriting.

(c) For signatures on applications for registration, see §151.26.

#### §151.166 Qualifications of purchaser.

The purchaser shall, at the time the order is submitted, be registered, under section 4722, at the location, in the classes, and under the registry number specified thereon by the district director, and shall have paid the special taxes necessary to qualify him in such classes for the fiscal year ending on the following June 30 or be a certified exempt official (see §§151.222 and 151.223). The purchaser shall likewise be qualified for the fiscal year within which the merchandise is received. Any person executing and presenting for filling an order form who at the time of such presentation is not so registered and has not paid the necessary special taxes or who is not a certified exempt official will be liable to the penalties provided by law.

#### §151.167 Items.

Only one item shall be entered on each numbered line and not more than 5 items shall be entered on a single order form. An item shall consist of one or more packages or bottles of the same kind and size; two or more such packages or bottles shall always be regarded as a single

item and shall never be counted on the form as two or more items. A separate item shall be made for each article of different description or size. The number of items entered on the form shall be stated by the purchaser in the space provided near the bottom of the form for that purpose. The purchaser shall show, with respect to each item, the number of stamped packages, the size of each package in terms of pounds, ounces, grains, pills, or tablets (indicating size in case of pills or tablets), if in a solid form, or in terms of gallons, quarts, pints, or ounces, if in liquid form; the name of the article desired, and the name and quantity of the narcotic drug contained in the article if it is not itself a pure narcotic drug. The showing of the catalogue number is optional with the purchaser.

### FILLING OF ORDER FORMS

#### §151.181. Who may fill.

Except as otherwise provided in this part, order forms may be filled only by a registered importer, manufacturer, producer, compounder, or wholesale dealer (a Class I or II registrant).

#### §151.185 Filling of orders.

The consignor shall enter upon the order form the number and size of the stamped packages furnished on each item and the date when each item is filled. When an order cannot be filled in its entirety, it may be filled in part and the balance supplied by additional shipments within 60 days from the date of the order form. A notation, covering each shipment, showing the actual quantities supplied and the date of delivery, shall be made by the vendor on the original and triplicate and by the vendee on the duplicate. The drugs shall be shipped only to the person and at the location specified by the district director on the face of the order form: *Provided, however,* That orders for narcotic drugs and preparations submitted on official order forms by authorized purchasing officers of the Armed Ser-

vices Medical Procurement Agency for delivery to armed services establishments within the United States may be shipped to locations other than the address specified on the order form, and in partial shipments at different times not to exceed six months from the date of the order, as designated by the procurement officer when submitting the order.

#### §151.186 Alterations.

No alteration, erasure, or change of any description may be made in any order, or in the indorsement thereon, by any person. The merchandise requested on an order form may not be furnished if the form shows any alteration or erasure, or evidence of any change whatsoever. If an order is not properly prepared in every respect it must be returned to the vendee.

#### §151.187 Acceptance.

An order is regarded as accepted when notice to that effect is given or, if no notice is given, when the goods are delivered or shipped.

#### §151.188 Unaccepted orders.

If an order is not accepted or if, for any reason, one cannot be filled, the form shall be returned to the vendee with a letter of explanation. When received by the vendee the returned original and triplicate and the letter of explanation shall be attached to the duplicate and retained on file.

#### §151.189 Endorsements.

An order form made out to a Class I or Class II registrant who cannot fill it may be indorsed in the spaces provided for that purpose on the reverse sides of the original and triplicate forms and referred by him to another such registrant for filling. The endorsement may be made only

by the person to whom the order is issued who shall be a Class I or II registrant. It shall show the name and address of the endorsee, shall bear the signature of the endorsing registrant or another person, provided a power of attorney authorizing such other person to make such endorsements has been executed and approved in accordance with §§151.144 and 151.165, and shall indicate the class or classes in which the endorser is registered, his registry number, the internal revenue district in which he is located and his complete address. The endorsee shall, upon receipt of such order, if he can fill the same, ship the drugs directly to the person and at the location specified by the district director on the face of the order and make notation of the filling of each item in the same manner as in other cases. No change or alteration by the endorsee in any endorsement is permissible.

#### §151.190 Reporting sales on endorsed orders in monthly returns.

Sales made on endorsed order forms shall be reported on Form 810b or 811b, as the case may be, in the same manner as other sales, except that on the line following that on which the sale is recorded, there shall be entered the name, address, registry and class numbers, and internal revenue district of the endorser.

### FILING OF ORDER FORMS

#### §151.201 Filing of order.

(a) The duplicate shall be kept on file by the vendee for at least two years. The original shall be filed and preserved for a like period by the vendor. The triplicate shall be forwarded by the vendor at the close of the month during which it is filled to the regional director for the district in which the vendor is located. Where an order is only partially filled during one month and other items thereon are to be supplied during a following month, as provided in §151.185, the triplicate should be retained by the vendor

and forwarded to the regional director at the close of the month during which the final shipment is made or during which the 60-day validity period expires.

(b) Any order form which is improperly executed or mutilated so as to make it unusable, shall not be destroyed, but all copies shall be kept on file with the other duplicates.

### EXCEPTIONS TO USE OF ORDER FORMS

§151.211 When forms not required.

The use of order forms is not required—

(a) For dispositions by a duly qualified and registered practitioner in the course of his professional practice only.

(b) For sales or other dispositions pursuant to properly executed prescriptions for legitimate medical purposes.

(c) For lawful exportations.

(d) For the sale, distribution, giving away, dispensing, or possession of exempt narcotic pharmaceutical preparations designated as Class "X" or Class "M" and listed in §151.428, providing the conditions of exemption set forth in §151.424 and §151.425 are met. [T.D. 58, 24 F.R. 2235, Mar. 21, 1959, as amended by T.D. 69, 27 F.R. 6328, July 4, 1962]

## APPENDIX C

## The Order Form

<b>TREASURY DEPARTMENT—INTERNAL REVENUE</b> <b>UNITED STATES OFFICIAL ORDER FORM—</b> <b>OPIMUM, COCA LEAVES, OPIATES, ETC.</b> <small>Purchaser must be properly registered for fiscal year before using this form.</small> <small>Supplier must be properly registered for fiscal year before he may sell.</small> <small>THIS IS AN ORDER TO SUPPLY THE DRUGS SPECIFIED BELOW.</small>				<small>NAME, ADDRESS, COUNTRY AND CLASS NUMBER, AND SUBJECT TO BE</small> <small>RECORDED IN COLLECTOR'S OFFICE</small> <div style="font-size: 2em; font-weight: bold; text-align: center;">SPECIMEN</div>		
No. A195639		DATE	19	ISSUED	BY	
To _____						
STREET		CITY		STATE		
TO BE FILLED IN BY PURCHASER						
ITEM	CATALOGUE NUMBER IF ANY	NUMBER OF PACKAGES	SIZE OF PACKAGE NO. OF LBS., OZ., GRAMS, PILLS, TABS., ETC., TO EACH Pkg.	NAME OF ARTICLE <small>NAME OF SUPPLIER MUST APPEAR HERE</small>	<small>NUMBER OF PACKAGES FURNISHED</small>	<small>DATE FILL</small>
1						
2						
3						
4						
5						
<b>THIS ORDER IS FOR EXACTLY _____ ITEMS.</b> <small>IF NAME OF DRUG NOT AS SPECIFIED BY PURCHASER OR AS ON SETTING</small>				<small>NAME OF FILLER OR FIRM IF NOT ON SETTING</small> <hr/> <small>SIGNATURE OF PURCHASER, OR HIS ATTORNEY OR AGENT</small> <hr/>		
SERIES 1948						

THE FRONT SIDE OF THE ORDER  
FORM ORIGINAL

<b>TREASURY DEPARTMENT—INTERNAL REVENUE</b> <b>UNITED STATES OFFICIAL ORDER FORM—</b> <b>OPIUM, COCA LEAVES, OPIATES, ETC.</b> <small>Purchaser must be properly registered for fiscal year before using this form.</small> <small>Supplier must be properly registered for fiscal year before he may fill in.</small> <small>THIS IS AN ORDER TO SUPPLY THE DRUGS SPECIFIED BELOW.</small>				<small>NAME, ADDRESS, BUSINESS AND CLUB NUMBERS, AND SUBJECT TO BE          INDICATED IN COLLECTOR'S OFFICE</small> <div style="text-align: center; font-size: 2em; font-weight: bold; transform: rotate(-5deg);">SPECIMEN</div>		
No. A195639		DATE	19	ISSUED	BY	
TO _____						
STREET		CITY		STATE		
TO BE FILLED IN BY PURCHASER						
ITEM	CATALOGUE NUMBER OF ART.	NUMBER OF PACKAGES	SIZE OF PACKAGE NO. OF LBS., OZ., GRAMS, PILLS, TABS., ETC., IN EACH PKG.	NAME OF ARTICLE <small>NAME OF SUBCUTIC DRUG TRADING MUST BE INDICATED</small>	To be filled in by assignee <small>NUMBER OF PURCHASES</small> <small>DATE FILLED</small>	
1						
2						
3						
4						
5						

DUPLICATE

THIS ORDER IS FOR EXACTLY _____ ITEMS. <small>NUMBER OF ITEMS MUST BE SPECIFIED BY PURCHASER ON PAGE RETURNED</small> <div style="text-align: center;">SERIES 1948</div>	<small>NAME OF PERSON ON FORM IF NOT AN INDIVIDUAL</small> <hr/> <small>SIGNATURE OF PURCHASER, OR HIS ATTORNEY OR AGENT</small> <hr/>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------

### THE FRONT SIDE OF THE ORDER FORM DUPLICATE

The front side of the triplicate is the same, except that the word triplicate is printed across it.

## ENDORSEMENT

A19569

(May be made only by the person or firm to whom this order is issued who must be a class 1 or 2 registrant)

To: Consignor \_\_\_\_\_

Address: Street \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_

Please send merchandise requested on reverse side of this order to person or firm designated and at location specified by Collector of Internal Revenue for the district in which said person or firm is located.

NAME OF PERSON OR FIRM TO WHOM ORDER IS ISSUED

SIGNATURE OF ENDORSEMENT, OR HIS ATTORNEY OR AGENT

Class (or classes) \_\_\_\_\_ Registry No. \_\_\_\_\_ Dist. \_\_\_\_\_

Street \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_

The person completing the stamp or preparation ordered on this form will send the "Fifteen" copy of the form to the District director supervisor for the district, promptly at the close of the month during which it is filled. See Article 26, Revenue Regulations No. 5, as revised.

REVERSE SIDE OF THE ORDER  
FORM TRIPLICATE

The reverse side of the original contains only the endorsement. The reverse side of the duplicate is blank.

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 189

JAMES MINOR, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR THE UNITED STATES

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## OPINION BELOW

The opinion of the court of appeals is reported at 398 F. 2d 511.

## JURISDICTION

The judgment of the court of appeals was entered on July 3, 1968 (App. 32). Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to August 30, 1968. The petition was filed on August 27, 1968, and was granted on June 2, 1969 (App. 33; 395 U.S. 932). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

(1)

**QUESTION PRESENTED**

Whether the order form requirements of 26 U.S.C. 4705 compel illicit sellers of narcotics to disclose incriminatory information, in violation of the privilege against self-incrimination.

**STATUTES AND RULES INVOLVED**

The pertinent parts of the relevant statutes and rules (26 U.S.C. 4701-4705, 4721-4724, 4731-4732, 4771-4773, 4775; 26 C.F.R. 151.21-151.24, 151.41, 151.121-151.22, 151.124-151.126, 151.128-151.130, 151.141-151.146, 151.161, 151.181, 151.185, 151.201, 151.479) are set forth in the Appendix, *infra*, pp. 19-43.

**STATEMENT**

Petitioner waived trial by jury and was convicted by a judge of the United States District Court for the Southern District of New York on both counts of an indictment charging two sales of narcotics drugs not in pursuance of a written order form, in violation of 26 U.S.C. 4705(a). He was sentenced to concurrent five-year terms of imprisonment on each count (App. 19). The court of appeals affirmed his conviction (App. 22-31).

The evidence, which is not in dispute, shows that on the evening of January 9, 1967, on 117th Street in Manhattan, petitioner sold "a half piece of heroin" to undercover narcotics agent Guzman for \$325.00 (App. 8-9). A similar transaction was repeated on 117th Street on April 8th of the same year. On this occasion Guzman purchased five "bundles" of heroin for \$450.00 (App. 10). Agent Guzman testified that on

neither occasion did he give petitioner a written order for the narcotics he bought on a form provided by the Secretary of Treasury (App. 17).

#### SUMMARY OF ARGUMENT

Petitioner's claim that his privilege against self-incrimination was violated by the procedures leading to his conviction in this case is without merit. Utterly unlike the statutes involved in the *Marchetti-Grosso* line of cases, the Harrison Narcotics Act entirely forbids transactions in illicit drugs by unregistered dealers, and does not envision any circumstance, even a remote one, in which an individual can legitimize an otherwise unlawful transaction in such drugs for federal purposes by registering and paying a tax. The particular provision in question in this case, 26 U.S.C. 4705(a), flatly forbids the sale of narcotics without an order form, which is obtainable from the Secretary of Treasury only by registered—i.e. lawful—purchasers. A person who sells narcotics without having received an order form is under no obligation of any kind to report that transaction to the government. To secure conviction of the offense, the government must prove affirmatively, as it did in this case, that no order form passed. Even if a seller prosecuted under general provisions of law for failure to keep or fill out an order form he received might have a defense against that charge based on the Fifth Amendment—a question not presented in this case—a seller who has never received an order form is under no incriminatory pressure whatever.

It becomes apparent on closer analysis that petitioner's real complaint is that federal law does not

permit him to sell narcotic drugs under any circumstances and enforces its prohibition by severe criminal penalties. As this Court decided long ago, *e.g.*, *Nigro v. United States*, 276 U.S. 332, the propriety of such a prohibition in the course of regulating through taxation the dangerous business of dealing in narcotic drugs is beyond constitutional question. In substance and effect, the Harrison Act operates like any other statute regulating the legality of carrying on a trade or profession. A person who is found unqualified to practice the trade or who has never applied to do so has no defense thereby to a prosecution for his unlawful practice of it.

#### ARGUMENT

#### I

PUNISHMENT OF A SELLER OF NARCOTICS UNDER 26 U.S.C. 4705 (a) FOR A SALE MADE WITHOUT AN OFFICIAL ORDER FORM DOES NOT OFFEND THE SELLER'S FIFTH AMENDMENT RIGHT NOT TO BE COMPELLED TO INCRIMINATE HIMSELF

Petitioner was convicted of having twice sold heroin to a purchaser without having obtained from him a written order on a form issued for that purpose by the Secretary of Treasury, all in violation of 26 U.S.C. 4705(a). Petitioner challenges his conviction on the ground that compliance with the order form requirement of the Harrison Narcotics Act of 1914 would have incriminated both himself and the purchaser required to apply for the order form by the Act. He argues that the conviction is invalid under the principles set forth in *Marchetti v. United States*,

390 U.S. 39; *Grosso v. United States*, 390 U.S. 62; *Haynes v. United States*, 390 U.S. 85; *Leary v. United States*, 395 U.S. 6; and *United States v. Covington*, 395 U.S. 57. The test established by these cases to determine the validity of this defense is whether “‘[l]iteral and full compliance’ with all the statutory requirements would have entailed a very substantial risk of self-incrimination.” *Leary supra*, 395 U.S. at 26. See also *Grosso v. United States*, 390 U.S. at 65. It is our position that the Harrison Narcotics Act of 1914 (as amended) differs critically from the statutes considered in the above-cited cases and by its express terms presents no substantial risk of self-incrimination. We begin our argument by examining the statutory scheme.

#### A. THE PLAN OF THE STATUTE

The Harrison Narcotics Act of 1914 (as amended) (26 U.S.C. 4701-4736, 4771-4774) is a comprehensive tax scheme designed to limit dealings in dangerous narcotic drugs to necessary drugs and legitimate purposes. In enacting the statute Congress evinced a dual purpose. It intended to raise revenue through the imposition of an occupational tax on legitimate dealers in narcotic drugs (and by subsequent amendment, in 1919, through the imposition of an excise tax on transactions in narcotic drugs) and at the same time to inhibit undesirable uses of narcotic drugs. Congress clearly expressed its intention to use the taxing power not only to raise revenue but also to curtail the illicit and clandestine traffic in narcotic drugs. Thus, the House Committee explained (H. Rep. p. 3):<sup>1</sup>

<sup>1</sup> H. Rep. No. 23, 63rd Congress 1st Sess. (1913).

It may be said that no individual has ever represented to the Committee on Ways and Means that the present extensive traffic in narcotics should be allowed to continue. The opinion of in fact every one except illicit dealers is that the traffic ought to be greatly diminished and *that narcotics should be confined to legitimate medical channels*. The only question at issue has been how best to do it. During the past five years the United States Opium Commission has made a thorough canvass of importers, manufacturers, physicians, and State officials, as well as of consumers, and as a result and in conjunction with a committee of representatives of the Department of State, the Treasury Department, and the Department of Justice, it has been decided by them that only by customs law and by the exertion of the Federal taxing power can the desired end be accomplished. In that opinion your committee concur. [Emphasis added.]

In order to achieve this policy, the original Harrison Narcotics Act of 1914, imposed an annual occupational tax on all persons who desired to handle narcotic drugs in the manner permitted by state and federal law. Under the provisions of the statute and the implementing regulations, any person who wishes to deal in (*i.e.*, import, manufacture, produce, compound, sell, deal in, dispense, or give away) narcotic drugs must register and pay an occupational tax at a rate prescribed by law (26 U.S.C. 4721-4722; 26 C.F.R. 151.21, 151.41).<sup>2</sup> Persons may not register under the

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<sup>2</sup> The original Harrison Narcotics Act of 1914, 38 Stat. 785, provided for a uniform occupational tax of \$1 per annum per

provisions of the Act, or pay the occupational tax, unless they can satisfy the Bureau of Narcotics and Dangerous Drugs, after an investigation, that they are qualified under state law to conduct the business or activity for which registration is sought (26 C.F.R. 151.23-151.24).

In 1919, the Harrison Narcotics Act was amended to impose, in addition, a commodity excise tax at the rate of 1 cent per ounce or fraction thereof on narcotic drugs which have been imported into or produced in the United States, and are then sold or removed for consumption or sale (26 U.S.C. 4701, 26 C.F.R. 151.121, 151.125-151.126).<sup>3</sup> When narcotic drugs are imported or produced and set aside for consumption or sale, the importer or producer must purchase from the district director of Internal Revenue adhesive stamps representing payment of the appropriate tax. The importer or producer then affixes these stamps to each package or container, according to its weight, prior to sale (26 U.S.C. 4707(a); 26 C.F.R. 151.128-151.130). Only persons registered as importers, manufacturers, producers or compounders under 26 U.S.C.

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registrant. In 1919, varying rates were established, depending upon the registrant's occupation (*i.e.*, importers, wholesale dealers, retail dealers, physicians, etc.). 40 Stat. 1130. Subsequent amendments in 1928 (45 Stat. 867) and 1936 (49 Stat. 1745) altered the rates of the tax.

<sup>3</sup> The occasion for the imposition of this tax was this court's decision in *United States v. Jin Fuey Moy*, 241 U.S. 394, which limited the effectiveness of the 1914 Act by holding that Section 8, punishing the possession of narcotics by "any person not registered" did not apply to a person who was not in the class required to register (see H. Rep. No. 767, 65th Cong., 2d Sess. (1918) p. 36).

4721—persons who by definition are qualified under state law to conduct business in narcotic drugs—may procure stamps by paying the excise tax (26 C.F.R. 151.130). No person is allowed to purchase, sell, dispense, or distribute narcotic drugs which are not in a stamped package or container (26 U.S.C. 4704(a)).

To ensure that legally processed drugs would not reach the illicit market, the Harrison Narcotics Act of 1914 made explicit the conditions under which the narcotic drugs could be sold. With the exception of drugs dispensed directly by physicians, or under written prescription, or for exportation, or sales to government and state officials (26 U.S.C. 4705(e)), all transfers of narcotics must be made pursuant to an official order form given to the transferor by the transferee (26 U.S.C. 4705(a); 26 C.F.R. 151.141). These order forms are available only upon application to the district director; the prospective purchaser must show, *inter alia*, that he is properly registered under the provisions of 26 U.S.C. 4722 and, therefore, qualified under state law to transact business in narcotic drugs (26 U.S.C. 4705(f); 26 C.F.R. 141.142–151.143). He is not required to name his prospective seller, however, in making his application (26 C.F.R. 151.143).

The order form is issued to the buyer, and sent by him to the seller, in triplicate (26 C.F.R. 151.161). The supplier-seller must enter upon the form the number and size of the stamped packages furnished on each item that is ordered and the date when each item is filled (26 C.F.R. 151.185). An order can be filled only by a seller who is lawfully registered under the Act (26 U.S.C. 4724; 26 C.F.R. 151.181). He is re-

quired to keep the original of the order form for two years, and to forward the triplicate to the government at the end of each month (26 U.S.C. 4705(d); 26 C.F.R. 151.201). The buyer receives the duplicate copy of the order form, and must retain it for two years (26 U.S.C. 4705(e)). Both copies, the buyer's and the vendor's, must be available for inspection by an authorized employee of the Treasury Department and any state official charged with the enforcement of the narcotics laws (26 U.S.C. 4705(d), (e), 4773; 26 C.F.R. 151.201, 151.479).

Enforcement of the order form provisions differs as between purchasers and sellers. A seller, such as petitioner, is liable to the penalties of 26 U.S.C. 7237 (b) if he makes a sale without the authority of an order form (26 U.S.C. 4705(a)). He commits no offense under Section 4705(a), however, if he receives an order form from his purchaser—however his purchaser may have obtained the form. Failure of a seller to fill in or preserve an order form is not punished specially under the narcotics statutes, but under general statutes, *e.g.*, 26 U.S.C. 7203, enforcing federal reporting and record-keeping requirements.<sup>4</sup> No statu-

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<sup>4</sup> The statute's absolute prohibition on sales without an order form applies to those legally in possession of narcotics as well as to unregistered sellers. In both cases the requirement is designed to ensure that narcotics do not fall into the hands of illicit buyers who cannot satisfy the registration requirements of Section 4722. A seller's failure to fill out or retain the order form in no way affects the statutory purpose of limiting sales to purchasers who may legally deal in narcotic drugs. As the Supreme Court stated in *Nigro v. United States*, 276 U.S. 332, 350-351 where the issue was whether the written order form

tory presumption aids the government in a prosecution under Section 4705(a); it must prove affirmatively that no order form passed in order to secure conviction. Purchasers, on the other hand, are not made liable under Section 4705(a) for failure to use order forms (although such a transaction will doubtless prove illegal as to them under coordinate statutes such as the tax stamp provision). Should a purchaser use an order form fraudulently or improperly, however, he is punishable under 26 U.S.C. 4705(g) to the extent provided by 26 U.S.C. 7237(a). Sellers are not punishable under this provision.

Overall, it is evident, as this Court recognized last Term in *Leary, supra*, that while the Marijuana Tax Act contemplated that both registered and unregis-

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provision applied to an unregistered seller who would not be allowed to register because he could not legally deal in narcotic drugs:

\* \* \* Congress intended not only to punish sales without registration under the first section, but also to punish them without order forms from the purchaser to the seller, as a means of making it difficult for the unregistered seller to carry through his unlawful sales to those who could not get order forms. Thus an illegal unregistered seller might wish to clothe his actual unregistered sales with order forms that would give the transaction a specious appearance of legality. To punish him for this misuse of an order form is not to punish him for not recording his own crime. It is to punish him for an added crime—that of deceiving others into the belief that the sale is a lawful sale. There is no incongruity in increasing the criminal liability of the non-registered seller who fails to use an order form in his sales, or who misuses it. Both the registered and the non-registered seller are, under our construction of the section, punished for not using the order forms as the statute requires, or for misusing them. \* \* \*

tered transferees could obtain order forms to complete a federally legal purchase of marijuana, Congress meant no such option to be available to purchasers of narcotic drugs under the Harrison Narcotics Act; no one but a registrant can obtain an order form legally. 395 U.S. at 21.<sup>5</sup> The purpose of the statute is, through taxation of narcotic drugs, to confine this important, but highly dangerous, business to legitimate channels and legitimate uses, and to prohibit altogether any dealings of any kind in any narcotic drugs by those not authorized to do so. In contrast to the statutes involved in the *Marchetti-Grosso* line of cases, a person who acts illegally under state law cannot meet the requirements of federal law by registering and paying a tax. To be able to meet federal requirements he must be a legitimate dealer under state law.

B. ILLEGAL SELLERS OF NARCOTICS SUFFER NO DISABLING INCRIMINATORY PRESSURES THROUGH THE ORDER FORM REQUIREMENTS OF 26 U.S.C. 4705(B).

It follows from the above analysis that an unregistered seller's "literal and full compliance" with all the statutory requirements" will *not* entail "a very substantial risk of self-incrimination." *Leary, supra*, 395 U.S. at 26. First, an unregistered seller of narcotics can comply fully with the federal scheme only in one way—by refraining from any sales. Unlike the statutes involved in the *Marchetti-Grosso* line of cases,

<sup>5</sup> Petitioner recognizes in his brief that order forms may be issued only to "transferees who are registered" (p. 7). He fails to note that the statute also requires that order forms be used only in connection with a "lawful" business or "legitimate" profession (26 U.S.C. 4705(g)).

the Harrison Act does not permit an illicit transaction to be clothed with legality under federal law, even in appearance, by registration and payment of a tax. All such transactions are condemned. Second, except for the very unlikely case where his purchaser illegally obtains and presents a federal order form,<sup>6</sup> an illegal seller is not required to report his sale. Reporting requirements apply only to sellers who do receive order forms, and then only after the order forms are received. All others are simply forbidden to sell; to establish guilt of that offense, the government must prove without their aid that they did sell without receiving a form. It is that conduct—sale without a form—and not failure to register, or pay a tax, or report, which the statute punishes. Finally, should the very unlikely occur and the seller receive an executed federal order form, he can no longer be punished under Section 4705(a). While he is then subject to reporting requirements, the unlikeliness of this situation makes it impossible to state that a “very substantial risk of self-incrimination” is involved in the statutory scheme as a whole. In any event, that claim is hardly open to persons who have received no form; and a failure to report is not punished under the narcotics statutes but under general law.

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<sup>6</sup> It is difficult to imagine situations in which persons legally in possession of order forms (and thus under obligation eventually to account for them to authorities) would wish to use them in a purchase on the illegal market. While theft of such forms is possible, the regulations severely limit the number of forms any but a manufacturer, importer, or wholesaler will have on hand at any given time (26 C.F.R. 151.143, 151.41(a)). We are unaware of any case in which this problem has arisen to date.

In sum, the fact that a prospective purchaser on the illegal market may be unable to obtain and present an order form for the narcotics he wishes to buy—and might have a self-incrimination defense if the statute made him criminally liable for failure to do so—creates no right in the seller to sell to him. He is free to refuse, and the statute unequivocally commands him to do so. What defenses might be available to sellers who do receive forms is irrelevant here. The only conduct charged is sale without an order form, which the government must affirmatively prove without the defendant's aid. It did so here. There was not even a remote possibility of incrimination involved; since petitioner was under no obligation to report anything to the federal government, he has no claim that its statutes forced him to reveal either state or federal offenses.

## II

### THE FEDERAL GOVERNMENT MAY PROPERLY LIMIT NARCOTICS TRANSACTIONS TO LEGITIMATE DEALERS AND NECESSARY DRUGS

On closer analysis, it becomes apparent that petitioner's real complaint is not that an illegal dealer cannot comply with federal law without incriminating himself. Rather, it is that an illegal dealer can never comply with federal law at all—doubly so with respect to heroin, in which, as petitioner states (Pet. Br. 22-23), Congress has outlawed virtually all transactions. The claim is thus that if Congress will not permit an illegal seller to register, or heroin to be sold, under the Act, it cannot punish him for his failure to follow

the forms of the Act in selling his heroin. But, in the main, these are questions this Court settled long ago. *Nigro v. United States*, 276 U.S. 332; *United States v. Doremus*, 249 U.S. 86; *Webb v. United States*, 249 U.S. 96. In using its taxing powers to confine narcotic drugs to legitimate channels, it is entirely appropriate for Congress to forbid dealings in any drugs, such as heroin, which it finds unnecessary for such use,<sup>7</sup> to forbid dealings to all but a carefully selected class of individuals, and to enforce its prohibition by criminal penalties.

There is a legitimate federal interest in confining the narcotics trade to legitimate channels. The federal tax is not merely a device to impose federal sanctions on illegal dealers. In December 1967, there were 397,775 licensees registered under the Harrison Narcotics Act. Bureau of Narcotics, *Report on Traffic in Opium and other Dangerous Drugs* (for year ended December 31, 1967) p. 42.<sup>8</sup> We are informed by the Bureau of Narcotics and Dangerous Drugs that in calendar year 1967, the federal government received revenue of \$1,274,425.93 under the registration and excise tax provisions of the Act, and in calendar year 1968 revenue of \$1,104,031.88. To be sure, the Act is also designed to prevent dealings in narcotics by non-

<sup>7</sup> The prohibition on transactions in heroin, enacted in 1956, 70 Stat. 567, 572, can also be viewed as having been based upon the Commerce Clause of the Constitution, and plainly is authorized thereby. That it is enforced in the form of a taxing statute may make it somewhat more cumbersome than would necessarily be required, but that is no ground for finding constitutional infirmity.

<sup>8</sup> There were only 83 registrants under the Marihuana Tax Act.

registered dealers. But that does not render the act involved improper as a tax measure.

Nor does it affect the validity of the order form (or stamped package) provision, designed to confine narcotics to legitimate channels, that illegitimate dealers cannot obtain such forms at all. *United States v. Doremus*, 249 U.S. 86; *Webb v. United States*, 249 U.S. 96. In sustaining the constitutionality of this section the Court said in the *Doremus* case (249 U.S. at p. 94):

\* \* \* The provisions of § 2 [26 U.S.C. 4705], to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic above-board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by federal law. \* \* \*

And in *Nigro v. United States*, 276 U.S. 332, this Court sustained the validity of the order form provision as being adapted to the enforcement of the tax even though an incidental motive of Congress in enacting this provision was to discourage harmful use of the drugs subject to the tax.

Under its plenary tax and commerce powers, Congress may place preconditions on the sale or purchase

of a regulated commodity. See *United States v. Wong Sing*, 260 U.S. 18, 21; cf. *Arrizon v. United States*, 224 F. Supp. 26 (S. D. Calif.). The transfer tax and order form provisions of the Harrison Act are such preconditions. There is no fundamental unfairness—and hence no violation of due process—in establishing a class of individuals who cannot meet or satisfy the preconditions and then punishing them criminally for engaging in the regulated activity without the necessity authority.

In substance and effect, then, the Harrison Act operates like any other statute regulating eligibility for carrying on a trade or profession. Certainly no one charged, for instance, with practicing law or medicine without a license, or operating a trucking company without a certificate of public convenience and necessity, could be heard to raise as a defense that it would be fundamentally unfair to prosecute him because his lack of qualification for the calling made it impossible for him to obtain the license or certificate.<sup>9</sup> Neither can petitioner complain because he is being subjected to the ordinary consequences of selling narcotics without having obtained an order form. Once he proceeded to engage in activities that only those who can satisfy

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<sup>9</sup> The analogy to licensing statutes is, we believe, apt. The order form does perform the function of a license. In *Nigro v. United States*, *supra*, 276 U.S. at 345, the Court viewed the objective of the order form provisions as effecting "a kind of registration of lawful purchasers, in addition to one of lawful sellers \* \* \*." Chief Justice Taft, for the Court, continued: "[t]he order form is not a mere record of a past transaction—it is a certificate of legality of the transaction being carried on \* \* \*." 276 U.S. at 351.

the prerequisites of the statute may perform, he exposed himself to punishment. Even though he was not within the class eligible to comply with the Act's criteria, he had no privilege to go ahead and sell heroin without obtaining an order form from the purchaser. His act in doing so made him subject to punishment on proof that he did the act which the statute forbids.

#### CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,  
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## APPENDIX

26 U.S.C. 4701 provides:

### IMPOSITION OF TAX

(a) *Rate.*

There shall be imposed an internal revenue tax upon narcotic drugs, produced in or imported into the United States, and sold, or removed for consumption or sale, at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on narcotic drugs.

(b) *By whom paid.*

The tax imposed by subsection (a) shall be paid by the importer, manufacturer, producer, or compounder.

26 U.S.C. 4702 provides in pertinent part:

### EXEMPTIONS.

(a) *Exceptions from certain provisions authorized for preparations of no addictive quality or of minor addictive quality.*

\* \* \* \* \*

(b) *Decocainized coca leaves.*

The provisions of this subpart and sections 4721 to 4726, inclusive, shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine.

(c) *Government and State officials.*

(1) *Stamping drugs.*

Officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any

of the business described in sections 4721 to 4726, inclusive, shall not be required to stamp narcotic drugs, as prescribed in this subpart, but their right to this exemption shall be evidenced in such manner as the Secretary or his delegate may by regulations prescribe.

\* \* \* \* \*

26 U.S.C. 4703 provides:

**AFFIXING OF STAMPS.**

The stamps provided in section 4771(a)(1) for narcotic drugs shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

26 U.S.C. 4704 provides:

**PACKAGES.**

*(a) General requirement.*

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

*(b) Exceptions in case of registered practitioners.*

The provisions of subsection (a) shall not apply—

*(1) Prescriptions.*

To any person having in his or her possession any narcotic drugs or compounds of narcotic drug which have been obtained from a registered dealer in pursuance of a written or oral prescription referred to in section 4705(c)(2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722; and where the bottle or other container in which such narcotic drug or compound of a narcotic drug may be put up by the dealer upon said prescription bears the name and registry num-

ber of the druggist, and name and address of the patient, serial number of prescription, and name, address, and registry number of the person issuing said prescription; or

(2) Dispensations direct to patients.

To the dispensing, or administration, or giving away of narcotic drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subpart of the drugs so dispensed, administered, distributed, or given away.

26 U.S.C. 4705 provides:

ORDER FORMS.

(a) *General requirement.*

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) *Exception in case of Virgin Islands.*

The President is authorized and directed to issue such Executive orders as will permit those persons in the Virgin Islands of the United States, lawfully entitled to sell, deal in, dispense, prescribe, and distribute narcotic drugs, to obtain said drugs from persons registered under section 4722 within the continental United States for legitimate medical purposes, without regard to the order forms described in this section.

(c) *Other exceptions.*

Nothing contained in this section, section 4735, or section 4774 shall apply—

(1) Use of drugs in professional practice.

To the dispensing or distribution of narcotic drugs to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722, in the course of his professional practice only: *Provided*, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, veterinary surgeon or other practitioner shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 4773.

(2) Prescriptions.

(A) To the sale, dispensing, or distribution of narcotic drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722: *Provided, however*, That (i) such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner who shall have issued the same; (ii) that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 4773.

(B) In lieu of a written prescription for such narcotic drugs or compounds of a narcotic drug which the Secretary or his delegate, in his discretion (after considering any views, expressed on the subject by the Surgeon General, United States Public Health Service; the Commissioner, United States Food and Drug Ad-

ministration; the respective heads of State narcotic law enforcement agencies; and the respective secretaries of national associations representing (i) narcotic drug manufacturers, (ii) physicians, and (iii) pharmacists), shall find and by regulation designate to possess relatively little or no addiction liability, the sale, dispensing, or distribution may be made by a dealer to a consumer upon oral prescription of a duly registered physician, dentist, veterinary surgeon, or other practitioner, which oral prescription is reduced promptly to writing, and the writing filed and preserved by the dealer for a period of two years from the date on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 4773. In issuing an oral prescription, the prescriber shall furnish the dealer with the same information as is required by law or regulation in case of a written prescription for narcotic drugs or compounds of a narcotic drug except for the written signature of the prescriber, and the dealer who fills such prescription shall be required to inscribe such information on the written record of the prescription made, filed and preserved by him, and shall inscribe on the label of the container of the narcotic drug or compound of a narcotic drug the same information as is required in filling a written prescription. An oral prescription shall not be refilled.

(C) If the Secretary or his delegate shall subsequently determine that a narcotic drug or a compound of a narcotic drug, to which the oral prescription procedure described in the preceding subparagraph has been made applicable, possesses a degree of drug addiction liability that, in his opinion, results in abusive use of such procedure, he shall by regulation publish the determination in the Federal Reg-

ister. The determination shall be final, and after the expiration of a period of six months from the date of its publication, the oral prescription procedure described in the preceding subparagraph shall cease to apply to the particular narcotic drug or to the particular compound of a narcotic drug which is the subject of the determination.

(3) *Exportation.*

To the sale, exportation, shipment, or delivery of narcotic drugs by any person within the United States or any Territory or the District of Columbia of any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State.

(4) *Government and State officials.*

To the sale, barter, exchange, or giving away of narcotic drugs to any officer of the United States Government or of any State, Territorial district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, Territorial, district, county, or municipal or insular hospitals or prisons.

(d) *Preservation.*

Every person who shall accept any order required under subsection (a), and in pursuance thereof shall sell, barter, exchange, or give away narcotic drugs, shall preserve such order for a period of 2 years in such a way as to be readily accessible to inspection by any officer or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 4773.

(e) *Duplicates.*

Every person who shall give an order as provided in this section to any other person for narcotic drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Secretary or his delegate, and in case of the acceptance of such order shall preserve such duplicate for said period of 2 years in such a way as to be readily accessible to inspection by the officers, employees, and officials mentioned in section 4773.

(f) *Supply.*

The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section, and shall cause the same to be distributed to each internal revenue district for sale to those persons who shall have registered and paid the special tax as required by sections 4722 and 4721; and he shall require that the same be sold only to persons who have registered and paid the special tax as required by said sections. The price at which such forms shall be sold shall be fixed by the Secretary or his delegate but shall not exceed the sum of \$1 per hundred. The Secretary or his delegate shall cause to be kept accounts of the number of such forms sold, the names of the purchasers and the number of such forms sold to each of such purchasers. Whenever any of such forms are sold, the Secretary or his delegate shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring narcotic drugs, or furnish any of the forms bearing the name of such purchaser to any person with intent thereby to procure the shipment or delivery of narcotic drugs.

(g) *Unlawful use.*

It shall be unlawful for any person to obtain by means of said order forms narcotic drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession.

(h) *Cross reference.*

For issuance of order forms in Puerto Rico and the Trust Territory of the Pacific Islands, see section 4735(a). For issuance of order forms in Guam, see section 4735(d).

26 U.S.C. 4721 provides:

IMPOSITION OF TAX.

On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away narcotic drugs shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30.

(1) Importers, manufacturers, or producers.

Importers, manufacturers, producers, or compounders, lawfully entitled to import, manufacture, produce, or compound narcotic drugs, \$24 a year;

(2) Wholesale dealers.

Wholesale dealers, lawfully entitled to sell and deal in narcotic drugs, \$12 a year;

(3) Retail dealers.

Retail dealers, lawfully entitled to sell and deal in narcotic drugs, \$3 a year;

(4) Physicians, dentists, veterinary surgeons, and other practitioners.

Physicians, dentists, veterinary surgeons, and other practitioners, lawfully entitled to distribute, dispense, give away, or administer narcotic drugs to patients upon whom they in the course of their professional practice are in attendance, \$1 a year or fraction thereof during which they engage in any of such activities;

(5) Persons engaged in research, instruction, or analysis.

Persons not registered as an importer, manufacturer, producer, or compounder and lawfully entitled to obtain and use in a laboratory narcotic drugs for the purpose of research, instruction, or analysis shall pay \$1 a year, but such persons shall keep such special records relating to receipt, disposal, and stocks on hand of narcotic drugs as the Secretary or his delegate may by regulation require. Such special records shall be open at all times to the inspection of any duly authorized officer or employee of the Treasury Department.

(6) Persons not otherwise taxed.

For a tax of \$1 a year on persons not otherwise taxed, dispensing preparations and remedies of limited narcotic content, see section 4702 (a).

(7) Persons in Canal Zone.

For authority of the President to issue Executive orders providing for the imposition of a special tax upon all persons in the Canal Zone, who produce, import, compound, deal in, dispense, distribute, sell, or give away narcotic drugs, see section 4735 (b).

26 U.S.C. 4722 provides:

**REGISTRATION.**

On or before July 1 of each year every person who engages in any of the activities enumerated in section 4721 shall register with the Secretary or his delegate his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration.

26 U.S.C. 4723 provides:

**POSSESSION BY PERSON NOT REGISTERED.**

The possession of any original stamped package containing narcotic drugs by any person who has not registered and paid special taxes as

required by sections 4721 and 4722 shall be prima facie evidence of liability to such special tax.

26 U.S.C. 4724 provides:

§ 4724. Unlawful acts in case of failure to register and pay special tax.

(a) *Trafficking.*

It shall be unlawful for any person required to register under the provisions of this subpart or section 4702(a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away narcotic drugs without having registered and paid the special tax imposed by this subpart or section 4702(a).

(b) *Transportation.*

Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, or deliver narcotic drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, into any other State or Territory or the District of Columbia, or any insular possession of the United States. Nothing contained in this subchapter shall apply—

(1) to any person who shall have registered and paid the special tax as required by sections 4721 and 4722;

(2) to common carriers engaged in transporting narcotic drugs;

(3) to any employee acting within the scope of his employment for any person who shall have registered and paid the special tax as required by sections 4721 and 4722, or to any contract carrier or other agent acting within the scope of his agency for such registered person;

(4) to any person who shall deliver any such drug which has been prescribed or dispensed by a physician, dentist, veterinarian, or other practitioner required to register under the terms of this subpart or section 4702(a) and employed

to prescribe for the particular patient receiving such drug;

(5) to any person carrying any narcotic drug or compound of a narcotic drug which has been obtained by the person from a registered dealer in pursuance of a written or oral prescription referred to in section 4705(c)(2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722, if the bottle or other container in which such drug or compound of a narcotic drug is carried bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person issuing such prescription;

(6) to any person carrying any such drug which has been obtained by the person as a patient from a registered physician, dentist, or other practitioner in the course of his professional practice if such drug is dispensed to the patient for legitimate medical purposes; or

(7) to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

*(c) Possession.*

It shall be unlawful for any person who has not registered and paid the special tax provided for by this subpart or section 4702(a) to have in his possession or under his control narcotic drugs; and such possession or control shall be presumptive evidence of a violation of this subsection and subsection (a), and also a violation of the provisions of sections 4721 and 4722: *Provided*, That this subsection shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this subpart or section 4702(a), having such possession or control by virtue of his employment or occupation and not on his own account; or to

the possession of narcotic drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this subpart or section 4702(a); or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any of said drugs, by reason of his official duties; or to a warehouseman holding possession for a person registered and who has paid the taxes under this subpart and sections 4701 to 4707, inclusive; or to common carriers engaged in transporting such drugs: *Provided further*, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this subpart or sections 4701 to 4707, inclusive; and the burden of proof of any such exemption shall be upon the defendant.

26 U.S.C. 4731 provides in pertinent part:

#### DEFINITIONS.

##### (a) *Narcotic drugs.*

The words "narcotic drugs" as used in this part shall mean any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium, isonipecaine, coca leaves, and opiate;

(2) Any compound, manufacture, salt, derivative, or preparation of opium, isonipecaine, coca leaves, or opiate;

(3) Any substance (and any compound, manufacture, salt, derivative, or preparation thereof) which is chemically identical with any of the substances referred to in clauses (1) and (2);

except that the words "narcotic drugs" as used in this part shall not include decocainized coca

leaves or extracts of coca leaves, which extracts do not contain cocaine or ecgonine.

*(b) Person.*

The word "person", as used in sections 4701 to 4707, inclusive, and sections 4721 to 4726, inclusive, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person.

*(c) Importer, manufacturer, or producer.*

Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution narcotic drugs shall be deemed to be an importer, manufacturer, or producer.

*(d) Wholesale dealer.*

Every person who sells, or offers for sale, any of said drugs in the original stamped packages as provided in section 4704(a) shall be deemed a wholesale dealer.

*(e) Retail dealer.*

Every person who sells or dispenses from original stamped packages as provided in section 4704 (a) shall be deemed a retail dealer: *Provided*, That the office, or if none, the residence, of any person shall be considered, for the purpose of this part, except sections 4711 to 4715, inclusive, his place of business.

\* \* \* \* \*

26 U.S.C. 4732 provides:

**RECORDS, STATEMENTS, AND RETURNS.**

*(a) Books and monthly returns of importers, manufacturers, and wholesale dealers.*

Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in narcotic drugs as the Secretary or his delegate may by regulations require.

*(b) Returns by registrants of drugs received.*

Any person who shall be registered with the Secretary or his delegate under the provisions of section 4722 shall, whenever required so to do by the Secretary or his delegate, render to the official in charge of the internal revenue district a true and correct statement or return, verified by affidavit, setting forth the quantity of narcotic drugs received by him in said internal revenue district during such period immediately preceding the demand of the Secretary or his delegate, not exceeding 3 months, as the Secretary or his delegate may fix and determine; the names of the persons from whom the said drugs were received; the quantity in each instance received from each of such persons; and the date when received.

26 U.S.C. 4771 provides in pertinent part:

**STAMPS.**

*(a) Method of payment.*

*(1) Stamps.*

The taxes imposed by sections 4701 and 4741 shall be represented by appropriate stamps, to be provided by the Secretary or his delegate.

\* \* \* \* \*

26 U.S.C. 4772 provides in pertinent part:

**EXEMPTION FROM TAX AND REGISTRATION.**

*(a) Employees.*

No employee of any person who has registered and paid a special tax as required in sections 4721 to 4726, inclusive, or sections 4751 to 4757, inclusive, acting within the scope of his employment shall be required to register and pay such special taxes.

*(b) Government and State officials.*

Officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the

exercise of their official duties engage in any of the businesses described in section 4741 or activities enumerated in sections 4751 and 4752, shall not be required to register, nor pay special tax, but their right to this exemption shall be evidenced in such manner as the Secretary or his delegate may by regulations prescribe.

\* \* \* \* \*

26 U.S.C. 4773 provides:

INSPECTION OF RETURNS, ORDER FORMS, AND PRESCRIPTIONS.

The duplicate order forms and the prescriptions, including the written record of oral prescriptions, required to be preserved under the provisions of section 4705 (c)(2) and (e), and the order forms and copies thereof and the prescriptions and records required to be preserved under the provisions of section 4742, in addition to the statements or returns filed in the office of the official in charge of the internal revenue district under the provisions of sections 4732(b) or 4754, shall be open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana. The Secretary or his delegate is authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in the office of any official in charge of an internal revenue district to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States as shall be entitled to inspect the

said statements or returns filed in the office of the official in charge of the internal revenue district, upon the payment of a fee of \$1 for each 100 words or fraction thereof in the copy or copies so requested.

26 U.S.C. 4775 provides:

**LIST OF SPECIAL TAXPAYERS.**

The Secretary or any officer or employee designated by him is authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in the respective internal revenue districts as special taxpayers under the provisions of sections 4721 to 4726, inclusive, section 4702 (a), section 4751, or section 4752, upon payment of a fee of \$1 for each 100 names or fraction thereof in the copy so requested.

26 C.F.R. 151.21 provides:

**PERSONS LIABLE.**

Liability to payment of special tax and registration attaches to every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, administers, or gives away narcotics. As to the tax rates applicable to a person engaged in one or more of the foregoing activities, see § 151.41.

26 C.F.R. 151.22 provides:

**MANNER AND TIME OF REGISTRATION.**

Every person required to register shall execute and file with the district director for the internal revenue district in which he proposes to engage in any activity involving use of narcotic drugs, an application for registration on Form 678 and pay the special tax or taxes enumerated in § 151.41. Form 678 shall be executed by new applicants and approved by the district director before the activity is commenced. Renewal applications shall be executed and filed on or before the succeeding July 1, and annually thereafter as long as liability is

incurred. Form 678 may be obtained from the district director. For the purpose of the special tax imposed by section 4721, Form 678 shall be considered a return.

26 C.F.R. 151.23 provides:

INVESTIGATION OF APPLICANTS.

(a) All new applications on Form 678 shall be referred by the district director to the appropriate narcotic regional director for investigation, report, and recommendation. Renewal applications on Form 678 shall also be referred by the district director to the appropriate narcotic regional director for investigation, report and recommendation, if the district director is in doubt as to the applicant's being lawfully entitled to engage in the activity for which he seeks registration.

(b) In the case of applications which have been so referred, the district director shall not issue a special tax stamp in connection with any registration until information has been submitted to him, by the narcotic regional director, that the applicant is properly licensed or otherwise lawfully entitled to engage in the activity in the internal revenue district in which he seeks registration.

(c) All applications for registration that are referred to the regional director shall be returned by him to the district director with recommendation for approval or disapproval and, in case of disapproval, with a statement annexed concerning applicant's lack of license or qualification, to lawfully engage in the activity for which registration is sought. The application together with any required statement shall be returned to the district director within 10 days from date of receipt of the application by the regional director, unless a longer time shall be required within which to complete an investigation. In the latter event the regional director shall, upon or before the ex-

piration of the said 10 days, so notify the district director stating the estimated additional time required.

26 C.F.R. 151.24 provides:

**EVIDENCE OF QUALIFICATION.**

The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought.

26 C.F.R. 151.41 provides in pertinent part:

**RATES OF TAX.**

(a) Persons subject to tax are divided into classes as shown by the table following:

Class	Annual tax rate	Persons liable
I.....	\$24	Importers, manufacturers, producers, compounders.
II.....	12	Wholesale dealers.
III.....	3	Retail dealers.
IV.....	1	Physicians, dentists, veterinary surgeons and other practitioners.
V <sup>1</sup> .....	1	Manufacturers of and dealers in exempt preparations (including dispensing physicians).
VI.....	1	Persons not registered in Class I, but lawfully entitled to obtain and use in a laboratory narcotics for the purpose of research, instruction or analysis.

<sup>1</sup> Persons paying tax in any of the Classes I to IV, inclusive, are not required to pay tax in Class V on account of manufacture or sale of exempt preparations.

26 C.F.R. 151.121 provides:

**SCOPE OF TAX.**

(a) The tax attaches to all narcotics domestically manufactured or produced, and all narcotics imported in crude or manufactured form.

(b) A new tax liability will attach whenever a new derivative, compound, or preparation is produced, whether or not tax has been paid on the component ingredients or parts thereof. Thus imported opium is subject to one tax, morphine produced in this country from such imported opium is subject to another tax, a preparation manufactured by the use of such morphine also will be subject to tax, and so on.

(c) Preparations and remedies coming with-

in the provisions of section 4702 are not subject to the tax. See §§ 151.421 to 151.423.

26 C.F.R. 151.122 provides:

**REPACKING.**

(a) Repacking narcotics is production within the intent of section 4701, and narcotics so produced are taxable, regardless of any tax previously paid thereon.

(b) Retail druggists may, under the conditions indicated in § 151.43, fill prescriptions and supply solutions for office practice without payment of tax on the narcotics furnished in such manner.

26 C.F.R. 151.124 provides:

**PERSONS LIABLE.**

The tax on imported narcotics is to be paid by the importer. The tax on narcotic drugs domestically manufactured, produced, or compounded, is payable by the manufacturer, producer, or compounder.

26 C.F.R. 151.125 provides:

**TIME OF PAYMENT.**

(a) *Importations.* The tax on imported narcotics must be paid before removal from customs custody.

(b) *Manufactured products.* The tax on narcotics domestically manufactured, produced, or compounded must be paid before sale or removal for consumption or sale.

26 C.F.R. 151.126 provides:

**AMOUNT OF TAX.**

The tax is 1 cent per ounce or fraction thereof in each package constituting a taxable unit. See § 151.127. For instance, the tax on a package containing  $5\frac{1}{2}$  ounces will be 6 cents. The tax on a package containing less than 1 ounce will be 1 cent. The tax is measured by the entire drug content of a taxable package or con-

tainer, not by the weight of the narcotic content therein.

26 C.F.R. 151.128 provides:

**MANNER OF PAYMENT.**

The tax is paid by attachment to the package forming the taxable unit of a stamp or stamps in sufficient amount. One or more stamps of an appropriate size shall be so affixed as to securely seal the package. In the case of bottles, cans, or other containers with stoppers, lids, or other removable closing devices, the stamp or stamps shall seal the stopper, lid, or other closing device at two opposite points.

26 C.F.R. 151.129 provides:

**KINDS OF STAMPS.**

Adhesive strip stamps are issued in the following denominations and sizes:

<i>Sizes</i>	<i>Denominations</i>
1½ by ¼ inch-----	1 cent.
2½ by ⅜ inch-----	1 and 2 cents.
4 by ½ inch-----	1, 2, 5, 6, 8, 10, and 16 cents.
6 by ¾ inch-----	1, 2, 5, 6, 8, 10, 16, 25, and 40 cents, and \$1 and \$1.28.

26 C.F.R. 151.130 provides:

**PROCUREMENT OF STAMPS.**

Stamps for affixing to packages or containers of narcotics will be furnished only on requisition of persons registered in Class I. The stamps are not transferable except to a successor in business who has registered and paid tax in Class I at the same location, but unused stamps may be redeemed. See § 151.461. The requisition shall be made on Form 786. Blank requisition forms may be procured from district directors. District directors will preserve the requisitions and keep a record of the total quantity of stamps secured by each person making requisitions.

26 C.F.R. 151.141 provides:

**WRITTEN ORDER REQUIRED.**

Except as otherwise provided, order forms are required for all sales or other dispositions of narcotic drugs.

26 C.F.R. 151.142 provides:

**BY WHOM PROCURABLE.**

Blank forms may be obtained only by persons who are duly qualified and registered under section 4722 of certified as purchasing exempt officials (see §§ 151.222 and 151.223) and have legitimate use therefor. Order forms will not be furnished to persons registered in Class V who are not manufacturers.

26 C.F.R. 151.143 provides:

**MANNER OF PROCUREMENT.**

A person desiring and entitled to receive order forms should submit requisition on Form 679 to the district director of the internal revenue district in which he is doing business. The order forms are issued in books each containing 10 sets of original, duplicate, and triplicate forms. Blank requisitions, Form 679, may be obtained from the district director and a replacement requisition blank is included in each book of forms. Each requisition shall show the taxpayer's name, address, registry number, and class, and the number of books of order forms desired. Unless the taxpayer is registered in Class I or II, only one book of order forms will be furnished on each requisition. A charge of 10 cents is made for each book of order forms issued to other than exempt officials, and the requisition should be accompanied by remittance of the proper amount in the form of a check, cash, or money order. For procurement of order forms by exempt officials, see § 151.224.

26 C.F.R. 151.144 provides:

§ 151.144 SIGNING OF REQUISITIONS.

Generally, requisitions for order forms shall be signed by the same person or persons signing the application for registration (see § 151.26). However, they may be signed by another person authorized by power of attorney previously filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature of the person thereby authorized to sign requisitions for order forms, and shall affirm that the signature so shown is his signature.

26 C.F.R. 151.145 provides:

SIGNATURES TO BE COMPARED.

Upon receipt by the district director of a requisition for order forms, the signature on such requisition shall be compared with that appearing on the application for registration or in the power of attorney (see § 151.144). Unless the district director is satisfied that the requisition is authentic, it will not be honored.

26 C.F.R. 151.146 provides:

PROCEDURE REGARDING ORDER FORMS.

Upon receipt of a properly executed requisition, accompanied by a sum sufficient to cover the cost of the order forms desired, the district director will issue the order forms requested. Before issuing the order forms the district director will cause to be shown thereon in a legible and permanent manner the name, address, registry number, and class number or numbers of the person to whom they are supplied, also the date of issuance and his signature or his name and the initials of the issuing employee.

26 C.F.R. 151.161 provides:

**EXECUTION OF FORMS.**

(a) Order forms are issued in triplicate and shall be executed in triplicate. They are arranged to permit the execution of the original, duplicate, and triplicate simultaneously by means of interleaved carbon sheets. The original and the triplicate, together with the intervening carbon sheet, must be furnished to the consignor, but shall not leave the possession of the person executing the order until the duplicate is made.

(b) The attachment of extra sheets to order forms is not permitted. If one order form is not sufficient to include all the items of an order, an additional form or forms shall be used. The order forms are intended solely to cover dispositions of taxable narcotic drugs and preparations to registered persons. They shall not in any case be used as prescriptions.

26 C.F.R. 151.181 provides:

**WHO MAY FILL.**

Except as otherwise provided in this part, order forms may be filled only by a registered importer, manufacturer, producer, compounder, or wholesale dealer (a Class I or II registrant).

26 C.F.R. 151.185 provides:

**FILLING OF ORDERS.**

The consignor shall enter upon the order form the number and size of the stamped packages furnished on each item and the date when each item is filled. When an order cannot be filled in its entirety, it may be filled in part and the balance supplied by additional shipments within 60 days from the date of the order form. A notation, covering each shipment, showing the actual quantities supplied and the date of delivery, shall be made by the vendor on the original and triplicate and by the vendee on the duplicate. The drugs shall be shipped only to

the person and at the location specified by the district director on the face of the order form: *Provided, however, That orders for narcotic drugs and preparations submitted on official order forms by authorized purchasing officers of the Armed Services Medical Procurement Agency for delivery to armed services establishments within the United States may be shipped to locations other than the address specified on the order form, and in partial shipments at different times not to exceed six months from the date of the order, as designated by the procurement officer when submitting the order.*

26 C.F.R. 151.201 provides:

#### FILING OF ORDER.

(a) The duplicate shall be kept on file by the vendee for at least two years. The original shall be filed and preserved for a like period by the vendor. The triplicate shall be forwarded by the vendor at the close of the month during which it is filled to the regional director for the district in which the vendor is located. Where an order is only partially filled during one month and other items thereon are to be supplied during a following month, as provided in § 151.185, the triplicate should be retained by the vendor and forwarded to the regional director at the close of the month during which the final shipment is made or during which the 60-day validity period expires.

(b) Any order form which is improperly executed or mutilated so as to make it unusable, shall not be destroyed, but all copies shall be kept on file with the other duplicates.

26 C.F.R. 151.479 provides:

#### RECORDS OPEN TO INSPECTION.

(a) Any officer, agent, or employee of the Treasury Department and the Department of Justice authorized to enforce the provisions of subchapter A, chapter 39, relating to narcotic

drugs, and any officer of any State, Territory, the District of Columbia, or insular possession of the United States charged with the enforcement of any law or municipal ordinance relating to the traffic in narcotic drugs, shall have authority to examine the books, papers, and records kept pursuant to the regulations in this part, and may require the production thereof.

(b) All order forms, duplicate forms, prescription records, returns, and inventories required under the provision of subchapter A, chapter 39, relating to narcotic drugs, or the regulations in this part to be kept on file shall be kept so that they can be readily inspected.

**FILE COPY**

FILED

OCT 8 1969

JOHN F. DAVIS, CL

**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1969**

**No. 189**

---

**JAMES MINOR,**

*Petitioner,*

*vs.*

**UNITED STATES,**

*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

---

**REPLY BRIEF FOR PETITIONER**

---

**PHYLIS SKLOOT BAMBERGER**

**WILLIAM E. HELLERSTEIN**

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**United States Court House**

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 189

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JAMES MINOR,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

REPLY BRIEF FOR PETITIONER

---

ARGUMENT

**The Government's Analysis of the Fifth Amendment Issue Raised by This Case Conflicts With Prior Decisions of This Court.**

In its brief, the government has apparently abandoned the principle of the severability of §4705(a) upon which the Second Circuit sustained the validity of the statute in this case. Instead, it seeks to have this Court hold §4705 constitutional by arguing that the statute does not violate petitioner's privilege against self-incrimination because in its practical operation it would be unlikely that a person such as petitioner could receive the order form from a buyer.

The government does not take issue with petitioner's assertion that compliance with the order form procedure requires record-keeping. Rather, its argument is premised on the assumption that the only way an illicit seller can avoid prosecution is by not selling at all. In *Marchetti v. United States*, 390 U.S. 39 (1968), however, this Court rejected such a thesis stating that:

"The Court held in *Lewis* [v. United States, 348 U.S. 419 (1955)] that the registration and occupational tax requirements do not infringe the constitutional privilege because they do not compel self-incrimination, but merely impose on the gambler the initial choice of whether he wishes, at the cost of his constitutional privilege, to commence wagering activities. The Court reasoned that even if the required disclosures might prove incriminating, the gambler need not register or pay the occupational tax if only he elects to cease, or never to begin, gambling. There is, the Court said, 'no constitutional right to gamble.' 348 U.S., at 423.

"We find this reasoning no longer persuasive. The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. Such inferences, bottomed on what must ordinarily be a fiction, have precisely the infirmities which the Court has found in other circumstances in which implied or uninformed waivers of

the privilege have been said to have occurred. See, e.g., *Carnley v. Cochrane*, 369 U.S. 506. Compare *Johnson v. Zerbst*, 304 U.S. 458; and *Glasser v. United States*, 315 U.S. 60. To give credence to such 'waivers' without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation.' Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 37. We cannot agree that the constitutional privilege is meaningfully waived merely because those 'inherently suspect of criminal activities' have been commanded either to cease waging or to provide information incriminating to themselves, and have ultimately elected to do neither."

390 U.S. at 51-52.

The government's attempt to distinguish this case from *Marchetti* by stating that "[t]he Harrison Act does not permit an illicit transaction to be clothed with legality under federal law, even in appearance, by registration and payment of a tax" (Resp's. br. p. 12) further demonstrates the erroneousness of its position. Section 4705(a) indicates that all sales, whether made by illicit or legal sellers, can, and indeed, must be made with an order form. The government also concedes that the statute is applied in this manner (Resp's. Brief at p. 9 fn. 4). Thus, a seller, although he may be in violation of state law and other federal legislation, complies with §4705 if he sells pursuant to an order form. *Nigro v. United States*, 276 U.S. 332, 350-351 (1928).

The government's attempt to obviate the unconstitutional posture of the statute as written by alluding to what it conceives to be its limited practical effect is an approach that has also been rejected by the Court. In *Leary v. United*

*States*, 395 U.S. 6 (1969), the government argued that Leary would not have been permitted to register to obtain the order form to purchase marijuana because he was not a legal dealer. Therefore, concluded the government, he would have been in no danger of self-incrimination. Since the government's position in *Leary* reflected its enforcement policy, Leary would never have been permitted to register and would never have been subjected to the risk of self-incrimination.

The actual operation of the government's enforcement policy was deemed irrelevant, however, as the Court made it clear that the real issue was not whether Leary would have been permitted to register but whether the statutory scheme and the intent of Congress was to require that he register. The Court found such a requirement to exist in the statutory scheme and held that Leary was entitled to the protection of the Fifth Amendment. The same analysis necessitates the same result in this case because, again, the issue is whether strict and literal compliance with the scheme as Congress intended it to operate would require disclosure of the incriminating information. That such was Congress' intent is fully demonstrated by our analysis of the statute set forth in our main brief at pp. 11-16.

We do not concede the government's practicality argument, for there is no factual basis in the record to support it. Moreover, the government acknowledges that there are instances when the unregistered seller would obtain the order form and therefore be subject to the reporting provisions. The government's conclusion that such instances are so unlikely as to create no substantial risk of self-incrimination misses the point, for personal rights under the Fifth Amendment are not dependent on the fortuitousness of the frequency of violation.

Even assuming the government's point, the situation is not significantly different from the *Marchetti* series of cases. Illegal gamblers, illegal possessors of firearms, and illegal buyers of marijuana as a practical matter did not register under the relevant statutes, *Leary v. United States*, *supra*, 395 U.S. at 25, yet the Court held that Fifth Amendment rights were applicable and endangered.

The government's last assertion is that petitioner cannot claim a violation of his Fifth Amendment rights because he received no order form (Resp. brief pp. 12-13)—a position that is inconsistent with the principle that one who receives the order form is subject to the record-keeping provisions and, therefore, must reveal information which is incriminating. Once again, the fallacy in the government's position is apparent from the fact that neither Leary, Marchetti, Haynes or Grosso registered under the statute pertinent to their respective cases. Yet, the Court permitted the defense of self-incrimination to bar conviction in each case stating in *Leary* that:

"The aspect of the self-incrimination privilege which was involved in *Marchetti*, and which petitioner asserts here, is not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. Thus, petitioner is . . . [asserting] that he cannot be convicted for having failed to comply with the transfer provisions of the Act at the time he acquired marijuana in 1965. His admission at trial that he had indeed failed to comply with the statute was perfectly consistent with the claim that that omission was excused by the privilege. Hence, it could not amount to a waiver of that claim."

**Conclusion**

For the above-stated reasons, the judgment should be reversed.

Respectfully submitted,

PHYLIS SKLOOT BAMBERGER

WILLIAM E. HELLERSTEIN

*Counsel for Petitioner*

Dated: October, 1969

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 271

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MICHAEL BUIE,

*Petitioner,*

versus

UNITED STATES

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE SECOND CIRCUIT

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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

68 Crim. 119

UNITED STATES

*vs.*

MICHAEL S. BUIE

RELEVANT DOCKET ENTRIES

Date

February 2, 1968	Filed indictment.
February 27, 1968	Pleads not guilty.
April 17, 1968	Before Cannella, J. Trial begun (jury)
April 19, 1968	Trial continued and concluded. Jury finds the Defendant Not Guilty on Count 1; Guilty on Count 2; Not Guilty on Count 3.
May 24, 1968	Filed Judgment. It is adjudged that the Defendant is hereby placed in the custody of the Attorney General or his authorized representative on Count 2 for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment.
July 15, 1968	Filed Judgment. It is adjudged that the Defendant is hereby committed to the Custody of the Attorney General or his authorized representative for treatment and supervision pursuant to Section 4253(a) of Title 18, U.S. Code until released by the United States Board of Parole. Such commitment shall be for an indefinite period but not to exceed five (5) years.

Date

- |                   |                                                                                                                                                             |
|-------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
| July 24, 1968     | Filed Notice of Appeal, dated July 18, 1968, to the U.S.C.A. from the judgment entered on July 15, 1968.                                                    |
| August 16, 1968   | Filed notice of motion for leave to appeal in forma pauperis from the judgment of July 15, 1968, granting extension of time to perfect the appeal, etc.     |
| September 4, 1968 | Filed order that the Defendant have leave to appeal in forma pauperis from the Judgment entered on July 15, 1968 without prepayment of costs and fees, etc. |

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

INDICTMENT: SECOND COUNT

The Grand Jury further charges:

On or about the 18th day of May, 1967, in the Southern District of New York, MICHAEL S. BUIE, the defendant, unlawfully, wilfully and knowingly did transfer to Dennis V. Nargi approximately 27 grams of marihuana, in that said transfer was not in pursuance of a written order of the said Dennis V. Nargi on a form issued in blank for that purpose by the Secretary of the Treasury of the United States, or his delegate. (Sections 4742(a) and 7237(b), Title 26, United States Code).

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

TRANSCRIPT OF TRIAL, APRIL 17 & 18, 1968

[fol. 2]

MISS TAYLOR: Yes, your Honor. I believe we do have some motions that we have to make.

THE COURT: Yes. I have read your papers and I think that the first one that I would like to decide is the motion which you made to dismiss on the grounds that certain areas required by the law would be self-incriminating and therefore under the Grosso and Marchetti cases it should be dismissed. I am prepared to rule on that and the Court rules in the following fashion:

The defendant having moved for an order dismissing the indictment on the ground that the statute under which the defendant has been admitted violate his Fifth Amendment privilege against self-incrimination and he urges that he may not be punished for failure to comply with the requirements, citing the line of cases decided by the Supreme Court on January 29, 1968, namely Marchetti v. the United States, 390 US 39, decided in 1968, [fol. 3] and Grosso v. the United States, decided in 390 US 62, also in 1968.

The nub of the allegation is that if the defendant would have registered or paid taxes under the statute he would have identified himself as being an individual involved in activities inherently suspect of criminal activities and he would have placed himself in an area permeated with criminal statutes.

In aid of his contention the defendant has cited the dissent of Judge Warren in the Marchetti case, suggesting the possible application of this rule to this case.

The government, in defense of these allegations, suggests the Supreme Court had the opportunity to consider this very question and ruled against the United States, 360 F. 2d 215, a Fifth Circuit case, of 1966, and in that case, in 3385 US 1018 in 1967, the Supreme Court denied certiorari.

Of course that particular case came before them precisely at the time that they were considering the Marchetti case.

[fol. 4] In this district the Court finds that two judges have rejected the contentions made by the defendant, namely Judge Motley, in U. S. v. Burgos, 67 Cr. 483, an unreported opinion in the Southern District here filed February 6, 1968, in which she went into a lengthy analysis of the cases in this area, and decided that while the reasoning may have eroded to some extent, it is still binding in this type of a case.

Similarly, Judge Frankel, citing the Burgos opinion, applied a similar rule in 67 Cr. 893, also an unreported case, United States v. Smith, in the Southern District of New York, decided on March 5, 1968.

Under the circumstances, I similarly adopt the reasoning and the rulings of my colleagues and I similarly deny this motion with an exception to the defendant.

\* \* \* \*

[fol. 23] DIRECT EXAMINATION BY MR. ROONEY:

Q Agent Nargi, directing your attention to May 18, 1967, at approximately 5 p.m., were you on duty on that occasion?

A Yes, sir, I was. I was with Agent Halperin and we went to 208 Forsyth Street and entered Mr. Buie's apartment. We were admitted by a female, and about five minutes later Mr. Buie entered the apartment.

I asked him if he could sell me any hashish and he said that he could sell me an ounce for \$90. He then asked me to call him back at 7:30, and he furnished me with a telephone number.

At 7:30 on that same night I did call him back and he said that he could sell me the hashish and asked me to [fol. 24] meet him at First Avenue and 4th Street at 9 p.m.

At 9 p.m. that night Agent Halperin and I went to First Avenue and Forsyth Street and about 15 minutes later Buie entered our car. He said that he could not sell us hashish that night, and I asked him if he could sell us any marijuana. He said that he could, and asked me

to drive with him and Agent Halperin to East Houston Street and Attorney Street. On entering that corner I stopped the car and Mr. Buie exited our car.

He then returned at about 10:20 p.m. that night and handed me five small Manila envelopes, one of which was opened. I examined the contents of one of these envelopes and gave Mr. Buie \$20. We then drove with Mr. Buie back to Forsyth Street and East Houston Street where he left our car.

Agent Halperin and I then went back to the Bureau of Narcotics office where he initialed and dated the evidence and Agent Halperin maintained custody of it.

On the next day, May 19, I witnessed Agent Halperin [fol. 25] weighing and sealing the evidence before he returned it to the United States Chemists.

Q By the way, is Forsyth Street as well as Attorney Street located in the Borough of Manhattan?

A Yes, sir.

Q Agent Buie, on this occasion, May 18, when you received the five Manila envelopes, did you give Mr. Buie a form issued by the United States Secretary of the Treasury or its delegate for the purchase of this substance?

A No, sir.

Q Did you have such a form?

A No, sir.

Q Did he give you such a form?

A No, sir.

\* \* \* \*

[fol. 40] Q The first time that you came to Mr. Buie's apartment, as I understand it, you came with Mr. Arlaus, is that correct?

A Yes, Madam.

Q When you came to the lower east side, you parked your car?

A Yes, I parked my car on East Houston Street.

Q Then what did you do?

A Agent Halperin and I stayed in the car while Mr. Arlaus left and walked down Forsyth Street.

Q When Mr. Arlaus—he came back, I take it, after that?

A Yes, after about ten minutes he returned.

Q What did he say at that time?

A He said that his friend could obtain the marijuana that we wanted.

[fol. 41] Q Then what did you do?

A Agent Halperin and myself and Mr. Arlaus then went into Mr. Buie's apartment.

Q What was Mr. Buie doing at that time when you sent into the apartment?

A We were introduced to him in the kitchen. I don't really know what he was doing.

Q Was he sitting or standing or talking?

A Well, when I first saw him he was standing in the kitchen, and then he left the kitchen and returned with the package.

Q Would you please tell me, when you first walked into the apartment, what did you say and what did the defendant Buie say?

A When I first met Buie in the kitchen?

Q Yes, right.

A I introduced myself as Danny and he introduced himself as Mike, and Agent Halperin introduced himself as Ray.

Q What did you say?

A I asked him if he had the half a pound of marijuana.

[fol. 42] Q What did Mr. Arlaus—what was he doing at this time?

A After Mr. Arlaus introduced everybody, he really wasn't doing anything. He was just watching and listening to Mr. Buie and myself.

Q How old was Mr. Arlaus?

A I believe at that time he was 27, 28.

Q Did Mr. Arlaus tell you prior to the time that you came to this apartment? Did he tell you that he had made any phone calls to Michael Buie?

A I don't know exactly if he said phone calls, but he did say that if we went into New York City that he could obtain a half a pound of marijuana, I would be able to buy half a pound of marijuana.

Q Did he tell you from whom?

A He didn't tell me the last name, no.

Q What did he say?

A I believe he just said a friend.

\* \* \* \*

[fol. 126] MISS TAYLOR: I will renew my motion again with respect to Count 3 and also I will renew my motion with respect to all of the three counts on the basis that all three counts violate the rights of the defendant under the Fifth Amendment as set forth in my motion earlier decided by your Honor.

THE COURT: The motion is denied in each case as to each count on that ground which has just been stated.

\* \* \* \*

[fol. 221] THE COURT: I assume you renew your motions?

MISS TAYLOR: Yes, I would like to renew my motion for a judgment of acquittal on the basis that the People have failed to prove this case beyond a reasonable doubt and, secondly, on the basis that the statutes here involved violate the defendant's rights under the Fifth Amendment under the United States Constitution pursuant to the argument that I had made in the motion prior to trial.

I would further make a motion for judgment of acquittal on the third count on the basis that there has been no proof that this was imported and in fact at this present time the defendant himself has testified that he did not know whether or not it was imported.

THE COURT: Each motion is denied with an exception to the defendant.

\* \* \* \*

[fol. 373] May 24, 1968

MISS TAYLOR: I have a fourth ground for the motion for a verdict of acquittal. I believe that I would also ask for acquittal on the grounds, again, that the statute under which the defendant was indicted was unconstitutional based upon the cases, the previous cases,

that I had cited: the marijuana statutes violate the defendant's rights.

THE COURT: What do you mean "was unconstitutional"?

[fol. 374] MISS TAYLOR: Is unconstitutional.

THE COURT: The statute has not deceased, has it? It is still in existence?

MISS TAYLOR: It is unconstitutional.

THE COURT: Is unconstitutional?

MISS TAYLOR: Right.

THE COURT: Those, then, are the four grounds?

MISS TAYLOR: On that count.

THE COURT: I will treat them in the inverse order in which you made them.

The motion is denied on the ground of unconstitutionality of the statute because the Court finds in the present state of the law it is constitutional.

\* \* \* \*

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 68 Cr. 119

UNITED STATES OF AMERICA

v.

MICHAEL S. BUIE

JUDGMENT—Filed May 24, 1968

On this 24th day of May, 1968, came the attorney for the government and the defendant appeared in person and <sup>1</sup> by counsel

IT IS ADJUDGED that the defendant upon his plea of <sup>2</sup> not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly transferring marihuana not in pursuance of a written order issued in blank for that purpose by the Secretary of the Treasury of the United States, or his delegate (Title 26, Sections 4742(a) and 7237(b) U.S. Code) as charged <sup>3</sup> in count 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby placed in the custody of the Attorney General or his authorized representative on count 2 for an examination to determine whether he is an addict and is likely to be rehabilitated through treatment.

The Attorney General shall report to the Court within THIRTY (30) DAYS or any additional period hereafter granted by the Court, the results of such examination and make any recommendations he deems desirable (18 U.S.C. 4252) and following such examination the defendant shall be returned to the Court for imposition of such sentence as the Court may then find and determine to

be authorized and appropriate or required by law to be imposed whether under Title 18, U.S.C. 4253 or whether under Title 26, Sections 4742(a) and 7237(b) U.S. Code.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN M. CANNELLA  
United States District Judge.

JOHN J. OLEAR, JR.  
Clerk.

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<sup>1</sup> Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." <sup>2</sup> Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," (4) "nolo contendere," as the case may be. <sup>3</sup> Insert "in count(s) number" if required. <sup>4</sup> Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. <sup>5</sup> Enter any order with respect to suspension and probation. <sup>6</sup> For use of Court wishing to recommend a particular institution.

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 68 Cr. 119

UNITED STATES OF AMERICA

v.

MICHAEL S. BUIE

JUDGMENT—July 15, 1968

On this 15th day of July, 1968, came the attorney for the government and the defendant appeared in person and<sup>1</sup> by counsel, and the Court having placed the defendant in the custody of the Attorney General for an examination pursuant to Title 18, Section 4252, U.S. Code, and the court having duly considered the results of such examination and the recommendations of the Attorney General thereon,

IT IS ADJUDGED that the defendant upon his plea of<sup>2</sup> Not Guilty and a verdict of Guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly transferring marihuana to another not in pursuance of a written order on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate (Title 26, Sections 4742(a) and 7237(b), U.S. Code) as charged<sup>3</sup> in Count 2 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted, and the Court having determined that the defendant is an addict and likely to be rehabilitated through treatment,

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for treatment and supervision pursuant to Section 4253(a) of Title 18, U.S. Code until released by

the United States Board of Parole. Such commitment shall be for an indefinite period but not to exceed FIVE (5) YEARS.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN M. CANNELLA  
United States District Judge.

JOHN J. OLEAR, JR.  
Clerk.

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<sup>1</sup> Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." <sup>2</sup> Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," (4) "nolo contendere," as the case may be. <sup>3</sup> Insert "in count(s) number" if required. <sup>4</sup> Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. <sup>5</sup> Enter any order with respect to suspension and probation. <sup>6</sup> For use of Court wishing to recommend a particular institution.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 346—September Term, 1968.

Argued January 23, 1969

Docket No. 32826

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UNITED STATES OF AMERICA, APPELLEE

—v.—

MICHAEL S. BUIE, APPELLANT

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Before: MEDINA, SMITH and HAYS, *Circuit Judges*.

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Appeal from judgment of conviction and sentence on trial to the jury in the United States District Court for the Southern District of New York, John M. Cannella, *Judge*, for unlawful transfer of marihuana in violation of 26 U. S. C. § 4742(a) and § 7237(b). Affirmed.

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GARY P. NAFTALIS, Asst. United States Attorney, Southern District of New York (Robert M. Morgenthau, United States Attorney and Douglas S. Liebhafsky, Asst. United States Attorney, on the brief), *for appellee*.

DAVID A. DIAMOND, New York, N. Y. (Harold J. Rothwax, New York, New York, on the brief), *for appellant*.

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OPINION—Decided March 12, 1969

SMITH, *Circuit Judge*:

The defendant, Michael S. Buie, was convicted after jury trial of selling marihuana without the mandatory

written order form required by 26 U. S. C. § 4742(a).<sup>1</sup> He was sentenced for an indefinite term not to exceed five years under the narcotics treatment and rehabilitation provisions of 18 U. S. C. § 4253(a).

The main question presented is whether the Fifth Amendment privilege against self-incrimination can be invoked in a situation where the seller is convicted of selling marihuana in violation of section 4742(a). Since we are unable to distinguish this case from a prosecution for the unlawful transfer of narcotics under 26 U. S. C. § 4705(a), we affirm the conviction on the basis of *United States v. Minor*, 398 F. 2d 511 (2 Cir. 1968).

Section 4705(a) prohibits the sale of narcotics drugs unless the buyer furnishes a written order form "issued in blank for that purpose by the Secretary [of the Treasury] or his delegate." In *Minor*, we concluded that the seller is not required to register or in any way incriminate himself in order to comply fully with the provisions of section 4705(a), since it is "the purchaser of narcotics and not the seller [who] is under compulsion to apply for and obtain the requisite order form." *Id.* at 515. The seller, therefore, can comply with section 4705(a) simply by requiring prospective purchasers to produce a valid written order form. Although 26 C. F. R. § 151.201 requires the seller to write his name on the written order form and forward a triplicate copy to the district supervisor, this is not done until after the transaction is completed, and thus it is possible for the seller to comply with the literal requirements of section 4705(a) and avoid the self-incrimination dilemma.

The defendant urges that 26 U. S. C. § 4742(a) is significantly different from the transfer provision we upheld in *Minor*. Actually there is only one difference, and it is not crucial. Like 26 U. S. C. § 4705(a), the section

<sup>1</sup> Section 4742(a) provides that:

"It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753 inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary [of the Treasury] or his delegate." [Emphasis added.]

involved here prohibits any transfer of marihuana unless the buyer furnishes the mandatory written order form. Before the purchaser can obtain the requisite order form, however, he must give not only his own name but the name of the proposed seller and state how much marihuana he expects to purchase.<sup>2</sup> Since the defendant has been convicted of selling marihuana in violation of 26 U. S. C. § 4742(a), and since section 4742(c) states those conditions which must be met before the purchaser can obtain a written order form, we must consider these two sections together in determining whether compliance by the purchaser would have posed a self-incrimination dilemma to the seller. See *Grosso v. United States*, 390 U. S. 62, 65 (1968), where Mr. Justice Harlan said that the risk of self-incrimination "may properly be determined only after assessment of the hazards of incrimination which would result from 'literal and full compliance' with all of the statutory requirements."

If section 4742(c) required the seller rather than the purchaser to write his name on the order form involved here as a prerequisite to any sale, this would undoubtedly violate the privilege against self-incrimination, since the seller would be "required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in the chain' of evidence tending to establish his guilt." *Marchetti v. United States*, 390 U. S. 39, 49 (1968). Similarly, the self-incrimination dilemma would be real if the statute required both buyer and seller to write their names on the written order form in advance of the proposed sale.

Our question, then, is whether the result should be different if the purchaser gives the name of the proposed seller. We think it should. As Judge Kaufman wrote in

<sup>2</sup> 26 U. S. C. § 4742(c) provides in pertinent part:

"Whenever any of such forms are sold, the Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same."

*Minor*, the privilege against self-incrimination is personal, and the seller therefore "cannot benefit from the privilege allegedly available to the buyer." 398 F. 2d at 513. Even if we assume, then, that 26 U. S. C. § 4742 (a) poses a self-incrimination dilemma to the *buyer*, *Minor* holds that the Fifth Amendment does not necessarily give immunity to the *seller*. "[I]t is clear that standing under the Fifth Amendment is not freely negotiable nor transferable." *Id.* at 513. This case is conceptually no different from a prosecution based on incriminatory admissions voluntarily made to a police informant. See *Hoffa v. United States*, 385 U. S. 293, 304 (1966).

The defendant also attempts to distinguish this case from *Minor* by suggesting that 26 U. S. C. § 4742(a) is aimed at a class "inherently suspect of criminal activity." *Marchetti v. United States*, *supra* at 57. In *Minor*, we held that section 4705(a) was "one section of an important and significant statutory scheme regulating the conduct of a lawful business," *id.* at 516, and concluded from the sizable class of legitimate users that the statute was not directed primarily at the criminal underworld. It is, of course, true that only 83 persons were registered under the marihuana laws in 1967. See U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs 42 (1967). In the first year following enactment of the marihuana registration statute, however, there were 3,665 marihuana registrants,<sup>3</sup> a figure which strikes us as plainly not insignificant and which shows that there was a legitimate traffic in marihuana requiring regulation.

The defendant also raises a number of related claims on the defense of entrapment. At trial Buie admitted selling quantities of marihuana without the written order form on May 8, 1967 (Count I) and May 18, 1967 (Count II), but said he had been entrapped. He testified that he had been introduced to government agents by a friend

<sup>3</sup> These figures are for 1938, the first year of operation under the predecessor to 26 U. S. C. § 4753. See U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs 56 (1966).

named Arlaus, and that he had been urged by Arlaus to make the illegal sales. While admitting that Arlaus was present at only the first of the two sales, Buie testified that he would not have made the second sale except for the fact that the agents claimed the friendship of Arlaus. The jury returned verdicts of not guilty on Count I and guilty on Count II.<sup>4</sup>

Contending that the jury, if properly instructed, could have found that Arlaus induced the second sale as well as the first, Buie asserts that the court erred in instructing the jury to consider each count separately. More specifically, he suggests that the jury should have been told to consider the possible effect on subsequent sales of any entrapment in connection with the first sale. Since there was no evidence linking Arlaus to the second transaction, however, we do not think that the circumstances warranted such instructions. Compare *Sherman v. United States*, 356 U. S. 369 (1958), where the government informer actively participated in every sale charged in the indictment. Even if we assume that Arlaus entrapped Buie into making the first sale, it does not follow that entrapment as to one transaction necessarily gives immunity as to all transactions. In any event, these instructions were not requested by the defendant. Rule 30, Fed. R. Crim. P.; *United States v. Re*, 336 F. 2d 306, 316 (2 Cir.), cert. denied 379 U. S. 904 (1964).

Buie also contends that the court should have given instructions which would have allowed the jury to find that Arlaus had acted either knowingly or unknowingly as a government agent. While the entrapment defense does not extend to inducement by private citizens, *Pearson v. United States*, 378 F. 2d 555 (5 Cir. 1967), the defense is available, of course, where government agents act through private citizens. *Johnson v. United States*, 317 F. 2d 127, 128 (D. C. Cir. 1963). Judge Cannella did instruct the jury that it should acquit the defendant if it found that the disputed sales were "induced by the

<sup>4</sup> A third count, not relevant here, charged the defendant with the possession of illegally imported marihuana in violation of 21 U. S. C. § 176(a). He was acquitted on this count.

government, either by themselves or with the aid and use of Arlaus," and we think these instructions were sufficient.<sup>5</sup> Indeed, Buie was acquitted on the only count involving a sale in which Arlaus was a participant.

The judgment is affirmed.

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<sup>5</sup> Judge Cannella also told the jury: "In the question of inducement, of course, the inducement must come from the government. You cannot be entrapped by a private person. The entrapment must be done by a government official or somebody acting under his orders and direction" [R. 307].

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Present: HON. HAROLD R. MEDINA  
HON. J. JOSEPH SMITH  
HON. PAUL R. HAYS  
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL BUIE, DEFENDANT-APPELLANT

JUDGMENT—March 12, 1969

Appeal from the United States District Court for the  
Southern District of New York.

This cause came on to be heard on the transcript of  
record from the United States District Court for the  
Southern District of New York, and was argued by coun-  
sel.

ON CONSIDERATION WHEREOF, it is now hereby  
ordered, adjudged, and decreed that the judgment of said  
District Court be and it hereby is affirmed.

A. DANIEL FUSARO  
Clerk

By: VINCENT A. CARLIN  
Chief Deputy Clerk

## SUPREME COURT OF THE UNITED STATES

No. 2083 Misc., October Term, 1968

MICHAEL BUIE, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN  
FORMA PAUPERIS AND GRANTING PETITION FOR  
WRIT OF CERTIORARI—June 23, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1559, placed on the summary calendar and set for oral argument immediately following No. 1473.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court,  
FILED

SEP 10 1969

IN THE SUPREME COURT OF THE UNITED STATES

JOHN F. DAVIS, CLERK

OCTOBER TERM, 1969

No. 271

PETITION NOT PRINTED

RESPONSE NOT PRINTED

MICHAEL BUTE,

*Petitioner,*

*vs.*

UNITED STATES,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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Petitioner's Fifth Amendment Privilege Against Self-Incrimination Is Violated by Conviction for Violation of 26 U.S.C. 4742(a) Which Requires Transfers of Marihuana to Be Made Only Pursuant to an Official Order Form, Since Compliance With That Law Requires Petitioner to Reveal Incriminating Information, to Insure Its Transmission to Federal and State Law Enforcement Officials and to Provide Evidence of His Unlawful Behavior ..... 6

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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1969**

**No. 271**

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**MICHAEL BUIE,**

*Petitioner,*

*vs.*

**UNITED STATES,**

*Respondent.*

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

---

**BRIEF FOR PETITIONER**

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**Opinion Below**

The opinion of the Court of Appeals for the Second Circuit (App. 13-18)<sup>1</sup> is reported at 407 F. 2d 905 (1969). No opinion was rendered by the district court.

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<sup>1</sup> "App." references are to the separate appendix filed pursuant to Rule 36 of this Court. The appendices to this brief will be cited as "Appendix A," etc.

### **Jurisdiction**

The judgment of the Court of Appeals for the Second Circuit (App. 19) was entered on March 12, 1969. On April 1, 1969, an extension of time to file a petition for writ of certiorari was granted and the petition was filed on May 9, 1969. The petition for writ of certiorari was granted on June 23, 1969 (App. 20).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

### **Constitutional, Statutory and Regulatory Provisions Involved**

#### **United States Constitution, Amendment V:**

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

#### **Statutes:**

The text of the statutes involved is set forth in Appendix A. The statutes are 26 U.S.C. 4741-4776.

#### **Regulations:**

Detailed regulations governing the working of the Marihuana Tax Act are found at 26 C.F.R. 152.1-152.134. The text of these regulations is not set out since the Constitutional argument made herein depends primarily upon the statutes involved.

### Question Presented

Do the provisions of 26 U.S.C. 4742(a) which require petitioner to transfer marihuana only in pursuance of an official order form, compliance with which would require petitioner to reveal incriminating information and to insure its transmission to federal and state law enforcement officials, violate petitioner's privilege against self-incrimination?

### Statement of Facts

Petitioner was charged with selling marihuana to federal narcotics agents on two occasions not in pursuance of a written order form issued by the Secretary of the Treasury as required by 26 U.S.C. 4742(a) (App. 1-2).<sup>2</sup> Petitioner had been introduced to the federal agents by one Arlaus, a friend of petitioner's. The introduction was made so that the agents might purchase marihuana from petitioner. The federal agents did not know petitioner's last name (App. 4-7; R. 16-17, 133-134, 146, 178-179, 206-207, 214).<sup>3</sup> On April 19, 1968, following a three day jury trial, petitioner was acquitted on one count and convicted on one count of selling marihuana in violation of 26 U.S.C. 4742(a) (App. 1, 9-10). He was committed for treatment and rehabilitation under the narcotics addiction program for an indefinite term not to exceed five years (App. 1, 9-10).

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<sup>2</sup> A third count charged petitioner with receiving, concealing and facilitating the transportation of marihuana knowing the same to have been brought into the United States contrary to law, in violation of 21 U.S.C. 176(a). Petitioner was acquitted on this count (App. 1).

<sup>3</sup> References to the record below appear as "(R. )".

On four separate occasions during the trial proceedings, petitioner moved for dismissal or acquittal on the ground that compliance with the statutes under which he was indicted required him to forfeit his privilege against self-incrimination. His motion was denied on each occasion (App. 3-4, 7-8).

On appeal to the United States Court of Appeals for the Second Circuit, petitioner challenged the validity of his conviction for transfer of marihuana without the written order form. It was argued that the statutory scheme, of which the order form requirement is a part, constitutes a violation of petitioner's right against self-incrimination under the decisions of *Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968), and *Haynes v. United States*, 390 U.S. 85 (1968).<sup>4, 5</sup>

The Court of Appeals affirmed the conviction, relying wholly on *United States v. Minor*, 398 F.2d 511 (2d Cir. 1968) (App. 13-18). *Minor* held that the self-incrimination privilege does not prohibit conviction of a seller of a narcotic drug for selling not in pursuance of a written order form as required by 26 U.S.C. 4705(a). The Court of Appeals did not distinguish the requirements of the narcotic drugs statutes (26 U.S.C. 4701-4736) from the requirements of the marihuana tax statutes involved here (26 U.S.C. 4741-4776) (App. 14-15). The Court of Appeals

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<sup>4</sup> A claim of error with respect to the charge to the jury on the defense of entrapment was also raised on appeal and was rejected by the Court of Appeals. That ground is not raised in this proceeding.

<sup>5</sup> At the time of the decision below the Supreme Court had not yet decided *Leary v. United States*, 395 U.S. 6 (1969).

found that the marihuana tax statutes, like the narcotic drugs statutes in *Minor*, did not pose a self-incrimination problem to a transferor even if they did pose such a problem to a transferee; both statutes were not aimed at a class "inherently suspect of criminal activities" but were rather statutory schemes regulating the conduct of a lawful business (App. 15-16).

### Summary of Argument

The marihuana tax provisions (26 U.S.C. 4741-4776) consist of an integrated network of statutes, a principal purpose of which is to expose the details of transactions involving marihuana to the close scrutiny both of federal and state law enforcement officials. The order form provisions of 26 U.S.C. 4742(a) as they relate to a transferor are an essential element of that purpose. The order form provisions violate petitioner's privilege against self-incrimination by compelling him, as a requirement of obeying federal law, to insure that his name and his address are recorded by the federal government as a proposed transferor of marihuana. This information is given to state law enforcement officials for use in the enforcement of state marihuana laws. Possession of marihuana is illegal, except under highly limited circumstances, in every state.\* The statute further requires him to obtain and keep available evidence of the completed marihuana transaction for inspection by law enforcement officers. These requirements taken by themselves or when considered, as they must be, in the context of the entire marihuana tax

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\* *Leary v. United States*, 395 U.S. 6, 16 (1969).

structure which includes the registration provisions (26 U.S.C. 4751-4757), exist in "an area permeated with criminal statutes", and those in petitioner's position are a group "inherently suspect of criminal activities."<sup>7</sup> Under recent cases decided by this Court, this statute violates petitioner's privilege against self-incrimination.

### ARGUMENT

**Petitioner's Fifth Amendment Privilege Against Self-Incrimination Is Violated by Conviction for Violation of 26 U.S.C. 4742(a) Which Requires Transfers of Marihuana to Be Made Only Pursuant to an Official Order Form, Since Compliance With That Law Requires Petitioner to Reveal Incriminating Information and to Insure Its Transmission to Federal and State Law Enforcement Officials and to Provide Evidence of His Own Unlawful Behavior.**

Petitioner was convicted for transferring marihuana not "in pursuance of a written order form of the person to whom such marihuana is transferred", in violation of 26 U.S.C. 4742(a). This conviction violates petitioner's privilege against self-incrimination, since compliance with the statute would have required petitioner to expose himself "to a real and appreciable risk of self incrimination" by revealing information which "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" within the meaning of *Leary v. United States*, 395 U.S. 6, 16 (1969), *Marchetti v. United States*, 390 U.S. 39,

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<sup>7</sup> *Marchetti v. United States*, 390 U.S. 45, 47 (1968), quoting *Albertson v. SACE*, 382 U.S. 70, 79 (1965).

48 (1968), *Grosso v. United States*, 390 U.S. 62 (1968), and *Haynes v. United States*, 390 U.S. 85 (1968).

#### A. THE STATUTORY SCHEME GOVERNING TRAFFIC IN MARIHUANA.

The Marihuana Tax Act,<sup>8</sup> now codified as 26 U.S.C. 4741-4776, contains a comprehensive integrated scheme of taxation, registration and recording, which is designed to expose to official scrutiny all aspects of traffic in marihuana.<sup>9</sup> The system consists of two parts. The first is a transfer tax and order form part, while the second is an occupational tax and registration part which relates to dealers.

26 U.S.C. 4741-4746 is the transfer tax and order form part. 26 U.S.C. 4741 imposes a transfer tax on all transfers which are required by section 4742 to be made pursuant to a written order form. The tax is payable by the transferee when he receives the order form, but if the transferee fails to obtain the form and pay the tax, the transferor is liable for payment of the tax (26 U.S.C. 4741(b)). The transfer tax rate is \$1 per ounce for transfer to any

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<sup>8</sup> "An Act to impose an occupational excise tax upon certain dealers in marihuana, to impose a transfer tax upon certain dealings in marihuana, and to safeguard the revenue therefrom by registry and recording," 50 Stat. 551 (1937).

<sup>9</sup> "Marihuana" is defined by §4761 to exclude from the coverage of the act the stalk, hemp, fibre, oil and seed when sterilized, thus eliminating from regulation the vast bulk of commercial dealings in products of the Marihuana producing plant. The legislative history reveals an intention to eliminate interference with legitimate usage of the plant. See Hearings Before the Committee on Ways and Means, House of Representatives, 75th Cong., First Sess. on H.R. 6385, statement of Clinton M. Hester, Assistant General Counsel for the Treasury Department, p. 8.

person who has registered and paid the special occupation tax under the occupational tax sections (§§4751-4757) and \$100 per ounce to all other transferees (26 U.S.C. 4741(a)(1) and (a)(2)). 26 U.S.C. 4742(a) requires that transfers be made only pursuant to a written order issued by the Secretary of the Treasury.<sup>10</sup>

26 U.S.C. 4742(d) provides that at the time when the Secretary of the Treasury issues the official order form (Appendix B) required by §4752(a), he shall record on the form the names and addresses both of the proposed transferor and the proposed transferee, and the amount of marihuana to be sold. The form is issued in triplicate, one copy of which is retained by the Secretary of the Treasury. The transferee receives two copies, one of which he gives to the transferor prior to the transfer of marihuana. Both transferor and transferee must keep their copies for two years and display them to any state or federal law enforcement official mentioned in §4773.

26 U.S.C. 4744 makes it unlawful for any transferee required to pay the §4741(a) transfer tax to acquire, transport or conceal marihuana without paying the tax. Proof that a person "shall have had in his possession any marihuana," combined with failure to produce the §4742(a) order form gives rise to a presumption of guilt under §4744.

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<sup>10</sup> 26 U.S.C. 4742(b) exempts from the order form requirement transfers to patients by doctors or other medical practitioners registered under §4753; transfers by druggists to patients based on prescriptions of doctors; lawful transfers for export; lawful transfers to federal and state officials; and certain transfers of seeds. Certain transfers by millers are exempted by 4742(e).

The occupational tax provisions are contained in 26 U.S.C. 4751-4757. Section 4751 requires that any person who "deals in" marihuana, i.e., who "imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers or gives away" marihuana shall pay an annual special tax. Any person subject to the §4751 special tax is required by §4753 to register his name and business address with the Internal Revenue Service. Section 4754 requires registrants under §4751 to supply reports, as demanded by the Secretary of the Treasury, setting forth in detail the sources of all marihuana acquired by the registrant in the preceding three months. Section 4755 makes it unlawful for any person required to register and pay the special tax as described in §§4751-4753 to engage in any of the activities described in §4751, i.e., "dealing", without having registered and paid the tax; this offense is designated "trafficking".

Sections 4773 and 4775 make the information obtained by the federal government pursuant to the order form provision, §4742, and the registration provision, §4753, available to federal, state and local law enforcement officials concerned with marihuana control. Under §4773 certified copies of the §4742 order forms are made available to any federal, state or local official whose job is concerned with the marihuana traffic. Section 4775 makes available to any interested person the name of any person registered as a special taxpayer, i.e., as a dealer in marihuana under §4751. Regulations implementing the Marihuana Tax Act are found at 26 C.F.R. 152.1-152.134.

**B. THE DANGER OF SELF-INCRIMINATION INHERENT IN THE ORDER FORM REQUIREMENTS APPLIES EQUALLY TO TRANSFERORS AND TRANSFEREES.**

This Court has recently reviewed the order form requirements of the Marihuana Tax Act and found that, as applied to a transferee, the statute compels exposure to a real and appreciable risk of self-incrimination. *Leary v. United States*, 395 U.S. 6, 16 (1969). The reasoning in that case was that compliance with the law required a transferee to reveal information which identified him as having a high probability of being guilty of crimes under both federal and state law; that an unregistered transferee was a member of a selective group inherently suspect of criminal activities; that the information so revealed was transmitted to relevant federal and state law enforcement officials; and that this information would prove a significant "link in a chain" of evidence tending to establish his guilt. Exactly the same reasoning which this Court applied to a transferee applies to a transferor.

Petitioner here is charged with transferring marihuana not pursuant to a written order form. The transferee must procure this order form from the federal government (§4742(a)). In order for the transferee to obtain the form he must first obtain the name and address of the proposed transferor from the transferor so that he can provide to the Secretary of the Treasury, prior to the transfer, his own name and address, the name and address of the transferor and the amount of marihuana to be transferred (§4742(c)). Therefore, to comply with the statute the transferor is compelled by law to give his name and address to the transferee, identifying himself as a seller of mari-

huana, so that the transferee, acting under compulsion of law, will pass this information to government officials engaged in apprehending violators of the marihuana laws, both state and federal.

It cannot be overlooked that a transferor of marihuana must at some point be a possessor of marihuana. As such he must necessarily also be either a transferee of marihuana, in connection with a prior transaction, or a producer or importer. All three of these ~~statutes~~ *Statutes* are very tightly controlled and highly circumscribed with criminal penalties by both federal and state law.

With respect to petitioner's status as a transferor under federal law, the occupational tax and registration provisions (§§4751-4757) require registration and payment of tax by anyone who "deals in" or transfers marihuana. This includes producers and importers. Transferring marihuana without having registered and paid the special tax is a federal crime under §4755. If petitioner was in fact not registered this fact would be readily determinable by the government, since the list of registrants is public (§4775). Compelling him to reveal his status as an unregistered transferor to the federal government by compelling him to comply with §4742(a) requires petitioner to incriminate himself under §4755. Moreover, the related portions of §4742 require petitioner to generate and preserve tangible admissible evidence of his illegal acts. Under §4742(d) petitioner receives a copy of the incriminating §4742(a) order form, listing him as a transferor (§4742(c)); he is required to keep the form for two years and display it to the various law enforcement officers who are informed of its existence under §4773.

Petitioner's status as a transferor necessarily implies his status as a transferee in an earlier transaction. As such he is required to have obtained an order form, copies of which should be on file with federal officials and in his possession. Failure to obtain an order form as a transferee constitutes a criminal violation of §4744. Moreover, under §4744(a), proof of possession of marihuana, whether present or past, combined with failure to produce a copy of the order form on demand, gives rise to a presumption of violation of 26 U.S.C. 4744. It is clear that compelling petitioner to comply with §4742(a) as a transferor also compels him to give information which incriminates himself as a transferee under §4744(a).

There is a small class of transferees exempted from the order form requirement, and therefore a theoretical possibility that petitioner could have obtained his marihuana in a lawful way even if he had not obtained order forms. Examination of this possibility, however, reveals that it is both hedged about with other incriminatory restrictions and is sufficiently unlikely to exist in fact, as to be insignificant. Section 4742 exempts from the order form requirement transfers (1) to patients by doctors registered under §4753; (2) to consumers (patients) by dealers, pursuant to a prescription by a registered doctor; (3) to persons in other countries; (4) to government officials; (5) of seeds to a person registered under §4753. The statute requires that detailed records of transfers to patients (exceptions 1 and 2 to §4742(b)) be kept. The record must show the name and address of the transferee, the date of transfer and the amount transferred. The record must be kept for two years and is available for inspection by state and federal law enforcement officers. Moreover, 26 C.F.R. 152.85 requires

that when a prescription is filled the container in which the marihuana is placed must indicate the name and registry number of the dealer, the name and address of the patient and the name, address and registry number of the person issuing the prescription. Under New York law it is a crime for a patient to possess marihuana outside of the original container in which it was dispensed, N.Y. Public Health Law, §3331(1). Petitioner could not qualify at all under exceptions (3), (4) or (5) to §4742(b) since they relate to transfers to persons outside the United States, to government officials, and to persons registered under §4753 respectively. It is clear, therefore, that those few exceptions which would allow petitioner lawfully to obtain marihuana to transfer (absent registration by petitioner and possession of order forms by petitioner as transferee in a prior transaction) generate sufficient records to expose petitioner as failing to come within the lawful limits of the exceptions. Revealing petitioner as an unlawful transferor would thus have a high probability of revealing him as an unlawful transferee.

It is also true, that law enforcement officials view disclosure of the status of transferor as carrying with it disclosure of the status of transferee. The dual dangers attached to disclosure of transferor status are amply demonstrated by the recent case of *United States v. Simon*, Docket No. 67 CR 45 (W.D. Wisc., 1967).<sup>11</sup> In that case one Friedman revealed to police that Simon had sold and was selling marihuana. While under police observation Friedman received a package of marihuana by mail from Simon. Thus

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<sup>11</sup> The statement of facts in this case is taken from the Opinion in *United States v. Simon*, 409 F.2d 474 (7th Cir. 1969), which dealt with another aspect of the same case.

the only known facts revealed Simon as a transferor. As a result of this knowledge Simon was indicted not only for transferring marihuana not pursuant to an order form, in violation of §4742(a), but also for being a transferee and transporting marihuana without having paid the transfer tax, in violation of §4744(a). Thus *Simon* serves to emphasize the danger accruing to one who by obeying 4742(a) expressly exposes himself as a transferor and by inference exposes himself as a transferee.<sup>12</sup>

The danger to petitioner as a result of compliance with the order form provisions with respect to incrimination under the laws of New York State, where the transfer in this case took place, has already been dealt with extensively by this Court in *Leary v. United States*, 395 U.S. 6, 16-18 (1969). In *Leary*, the petitioner, a transferee, had failed to obtain an order form from the Secretary of the Treasury, an event which must take place prior to the transfer (26 U.S.C. 4742). Had he obtained such a form the information it contained would have been available to New York State narcotics laws enforcement officers (26 U.S.C. 4773). With respect to the resulting danger, this Court found that:

"Petitioner had ample reason to fear that transmittal to such officials of the fact that he was a recent, unregistered transferee of marihuana 'would surely prove a significant "link in a chain" of evidence tending to establish his guilt' under the state marihuana laws then in effect. When petitioner failed to comply

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<sup>12</sup> The indictment against Simon was dismissed with respect to the violations of §4742 and §4744. The Opinion, which applied the *Leary* reasoning to a transferor is attached hereto as Appendix C.

with the Act, in late 1965, possession of any quantity of marihuana was apparently a crime in every one of the 50 States, including New York, where petitioner claimed the transfer occurred, and Texas, where he was arrested and convicted. It is true that almost all States, including New York and Texas, had exceptions making lawful, under specified conditions, possession of marihuana by: (1) state-licensed manufacturers and wholesalers; (2) apothecaries; (3) researchers; (4) physicians, dentists, veterinarians, and certain other medical personnel; (5) agents or employees of the foregoing persons or common carriers; (6) persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person; and (7) certain public officials. However, individuals in the first four of these classes are among those compelled to register and pay the occupational tax under §§4751-4753; in consequence of having registered, they are required to pay only a \$1 per ounce transfer tax under §4741(a)(1). It is extremely unlikely that such persons will remain unregistered, for failure to register renders them liable not only to an additional \$99 per ounce transfer tax but also to severe criminal penalties. Persons in the last three classes mentioned above appear to be wholly exempt from the order form and transfer tax requirements.

"Thus, at the time petitioner failed to comply with the Act those persons who might legally possess marihuana under state law were virtually certain either to be registered under §4753 or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to

obtain an order form constituted a 'selective group inherently suspect of criminal activities.' Since compliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination." *Leary v. United States*, 395 U.S. 6, 16-18.

The dangers under New York State law which this Court found attached to a transferee conforming to §4742 apply equally to a transferor complying with §4742, since the illegal status under New York State law is purely and simply that of a "possessor". New York Public Health Law §3305 places a flat prohibition on possession of marihuana except as authorized by the Public Health Law. The exceptions to this flat prohibition are those noted by the Court in *Leary*.

An examination of the order form actually used under §4742 is instructive. See Appendix B. This form is an authorization, directed to a named proposed transferor, to transfer specified quantities of marihuana to a named proposed transferee. To the extent that this form is evidence of possession on anyone's part, and hence evidence of violation of state law, it is evidence of possession by the named transferor. When the form is filed, the transfer has not yet taken place and the drug may be presumed to reside with the transferor. Nevertheless, this Court, in *Leary*, recognized that the existence of the form indicates the described transaction will very shortly have been

completed.<sup>13</sup> This Court having held that listed status on the §4742 form as a transferee "would surely prove a significant link in a chain of evidence tending to establish his guilt," *Leary v. United States*, *supra* at 18, it follows *a priori* that listing as a proposed transferor gives rise to such danger.

It is clear, for the reasons stated above, that one in petitioner's position is a member of a class "inherently suspect of criminal activities." *Marchetti v. United States*, *supra* at 57. However, the Court of Appeals, relying wholly on *United States v. Minor*, 398 F.2d 511 (2d Cir. 1968), a case dealing with the position of a transferor under the narcotic drug laws, rejected this claim. The Court of Appeals relied upon its finding in *Minor* that the transfer requirement under the narcotic drug laws was "one section of an important and significant statutory scheme regulating the conduct of a lawful business." *United States v. Minor*, *supra* at 516, quoted in *United States v. Buie*, 407 F.2d 905 (2d Cir. 1969), at 907. It found that this rule was equally applicable to the marihuana laws. In so deciding, the Court of Appeals overlooked both the structure of the marihuana statute and the differences in the subject matter regulated by the narcotic drug laws and the marihuana laws.

*Minor* held that the position of a transferor of narcotic drugs who violates the order form requirements of 26 U.S.C. §4705 was not protected by the privilege against

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<sup>13</sup> The Court considered that the information transmitted to law enforcement officials as a result of the filing of the form is that petitioner "was a recent, unregistered transferee of marihuana." 395 U.S. at 16.

self-incrimination as developed in *Marchetti, Grosso and Haynes*. In reaching this conclusion the *Minor* Court found that the sizable legitimate trade in narcotic drugs created a valid government purpose of regulation and meant that the statute was not aimed at a criminally suspect class. The Court noted that in 1965 nearly 400,000 people were registered under the narcotic drug laws and were thereby authorized to obtain order forms from the Treasury Department.<sup>14</sup> *United States v. Minor, supra* at 516. More than 400,000 kilograms of narcotic drugs were legally imported in that year. With such a sizable legitimate trade, the Court believed that §4705, taken by itself, serves the valid purpose of seeing that narcotic drugs legitimately present are not sold to anyone who is not authorized to buy them and who did not pay the tax. Moreover, the sizable class of legitimate users indicates that the statute is not aimed at a group "inherently suspect of criminal activities."

The facts surrounding marihuana are in absolute contrast to the facts surrounding narcotic drugs. In the same year in which nearly 400,000 persons were registered under the narcotic drug laws, exactly 89 persons were registered under the marihuana laws. These consisted of 5 importers and manufacturers, 9 dealers, 59 practitioners and 16 researchers.<sup>15</sup> While the number of narcotic drug registrants has increased approximately 20% since 1936, the number of marihuana registrants has declined from 3,665 in 1938,

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<sup>14</sup> Under the narcotic drug laws, unlike the marihuana laws, only registered persons may procure order forms. 26 U.S.C. 4705(f).

<sup>15</sup> U.S. Treasury; Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs*, Government Printing Office, 1966 at 56.

the first year for which figures are given, to 83 in 1967.<sup>16</sup> While the Bureau of Narcotics material gives several pages detailing numerically the production and distribution of narcotic drugs, the principal table governing the sources and distribution of marihuana for 1966 simply shows the number of acres of marihuana destroyed on a per state basis in one year. While the 1967 report contains six pages of detailed information on the legitimate production of narcotic drugs including classes of drugs, licenses to produce drugs, quantities of various drugs produced and disposition of drugs produced, the report contains no information at all on the valid uses of marihuana.<sup>17</sup> No statement as to any lawful importation of marihuana is made, although a table of importation of narcotic drugs is given.<sup>18</sup> Considering these facts, it is without doubt true that, unlike the narcotic drug acts, the marihuana statutes are aimed at a class "inherently suspect of criminal activities" and are intended to close down a criminal business rather than to regulate a legitimate one.<sup>19</sup>

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<sup>16</sup> U.S. Treasury; Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs*, Government Printing Office, 1967 at 42. The marihuana registrants at the end of 1967 consisted of 6 importers and manufacturers, 1 grower, 6 dealers, 49 practitioners and 21 researchers.

<sup>17</sup> U.S. Treasury, Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs*, Government Printing Office, 1967, pages 18-21, 41-42. The only reference to legitimate usage of marihuana in the entire report, other than the number of lawful registrants, was this sentence: "Narcotic drugs have proved themselves invaluable to modern medicine while both narcotics and marihuana play an important role in scientific research and experimentation," at page 17.

<sup>18</sup> *Ibid.*, page 41.

<sup>19</sup> The court in *Buie* acknowledged that only a trivial number of registrants are presently regulated by the marihuana tax statutes (App. 16). However, the court felt that the originally substantial

In addition, the Court of Appeals in *Buie* overlooked the significance of the relationship between the occupational tax sections and the transfer tax sections of the marihuana law on the question of the "inherently suspect" nature of the group at which it is aimed. 26 U.S.C. 4751-4753 requires everyone who deals in marihuana to register; a "dealer" is for practical purposes synonymous with a transferor. The class of unregistered transferors is absolutely suspect under federal law. To the extent that the order form provisions are aimed at that class, which includes petitioner, they are aimed at a suspect class.<sup>20</sup> The nature of the suspect class with respect to state law has already been dealt with by this Court in *Leary*. The Court concluded:

"Thus, at the time petitioner failed to comply with the Act those persons who might legally possess marihuana under state law were virtually certain either to be registered under §4753 or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to obtain an order form constituted a 'selective group inherently suspect of criminal activities.' Since com-

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number of registrants meant that the current regulation was of a legitimate traffic in marihuana. However, it is the condition existing at the time a law is challenged rather than the condition that existed at the time of its passage which must be considered in gauging its validity. See, e.g., the approach of this Court in *Leary v. United States*, 395 U.S. 6, 37-43 (1969) in considering the validity of a presumption in the light of changed circumstances.

<sup>20</sup> Indeed, the legislative history of the act demonstrates that regulation of legitimate users of marihuana was intended to be accomplished through the registration provisions while the order form provisions were intended primarily to reveal unlawful users. See Hester, Hearings before the House Committee on Ways and Means on H.R. 6385, 75th Cong., 1st Sess. (1937) at pages 45-47.

pliance with the transfer tax provisions would have required petitioner unmistakably to identify himself as a member of this 'selective' and 'suspect' group, we can only decide that when read according to their terms these provisions created a 'real and appreciable' hazard of incrimination." *Leary v. United States*, 395 U.S. 6, 18.

The same reasoning applies to a transferor, since the illegal act under state law is that of possession. The dangers to a transferor are as great as those to a transferee and the *Leary* and *Marchetti* reasoning, rather than the *Minor* reasoning, should apply.

#### C. THE FIFTH AMENDMENT PRIVILEGE APPLIES TO THE POSITION OF A TRANSFEROR OF MARIHUANA.

##### 1. *Exposure of the Transferor Is an Essential Purpose of the Marihuana Tax Statutes*

The marihuana tax statutes provide a system of registration, order forms and informational tax returns which have the effect of exposing the details of all marihuana transfers to the examination of law enforcement officials. These details include names and addresses of both buyers and sellers and quantities of drug transferred. It is obvious from the workings of the statute that information about sellers is as much sought as information about buyers. All dealers must register (§4753). All registrants must file returns setting forth in detail the sources of all marihuana they receive (§4754). Transferees must file the details of proposed transactions with the government, including the name of the transferor, prior to the transfer (§4742). That information which might be useful to federal and state prose-

cutorial agencies is made available to them (§§4773, 4775). To facilitate the work of the law enforcement agencies, the parties involved are required to maintain evidentiary records of the transaction, which must be available to the agencies (§4742). It is clear from examination of the statutory scheme that exposure of all parties to transactions in marihuana is an essential purpose of the act, and not a by-product of its revenue producing purpose.

A review of the legislative history of the Marihuana Tax Act reveals that it is precisely the disclosure, both of the transferor and of the transferee, which Congress sought to bring about. The bill originated in the House of Representatives where hearings were held before the Committee on Ways and Means. The initial descriptive and explanatory statement of the bill was made by Clinton M. Hester, the Assistant General Counsel of the Treasury Department. He described the objectives of the bill as follows:

"In accomplishing this general purpose two objectives should dictate the form of the proposed legislation: First, the development of a scheme of taxation which would raise revenue and which would also render virtually impossible the acquisition of marihuana by persons who would put it to illicit uses without unduly interfering with the use of the plant for industrial, medical and scientific purposes; and, second, the development of an adequate means of publicizing dealings in marihuana in order that the traffic may be effectively taxed and controlled."<sup>21</sup>

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<sup>21</sup> Hearings on H.R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess. (1937) at p. 7.

Substantially the same language appears in the Senate Hearings,<sup>22</sup> Senate Report,<sup>23</sup> and in Congressional debate.<sup>24</sup> In reviewing the validity of the transfer tax provisions in *United States v. Sanchez*, 340 U.S. 42 (1950), the Supreme Court noted that Congress had dual objectives in passing the Act, and quoted the above quoted language of Mr. Hester.<sup>25</sup> In addition, during the House hearings on the bill Mr. Hester explained the bill in some detail. He described it as a synthesis of the Harrison Narcotics Act (38 Stat. 785) and the National Firearms Act (48 Stat. 1236). Mr. Hester then reviewed the various Supreme Court decisions which had sustained the Constitutionality of these acts and related the proposed Marihuana Tax Act provisions to these cases.<sup>26</sup> In discussing the order form requirement of the Marihuana Tax Act, Mr. Hester quoted from *Nigro v. United States*, 276 U.S. 332 (1928) which concerned the order form provisions in the Harrison Narcotics Act.

" . . . . The provision of section 2 making it an offense to sell unless the purchaser gives a particular official

<sup>22</sup> Statement of Clinton M. Hester, Assistant General Counsel, Treasury Department, in Hearings before a Subcommittee of the Committee on Finance, United States Senate, 75th Cong., 1st Sess., on H.R. 6906 at p. 6.

<sup>23</sup> Senate Report No. 900 Committee on Finance, 75th Cong., 1st Sess. (1937) to accompany H.R. 6906, at p. 3.

<sup>24</sup> 81 *Cong. Rec.* p. 5689 at 5690, 75th Cong., 1st Sess (House); 81 *Cong. Rec.* p. 1440 at 1441, 75th Cong., 1st Sess. (Extension of Remarks of Congressman Buck).

<sup>25</sup> Petitioner has not located any authority which disagrees with Mr. Hester's statement of the dual objectives of the Act.

<sup>26</sup> Statement of Clinton M. Hester before the House Committee on Ways and Means, 75th Cong., 1st Sess. (1937) on H.R. 6385 at pp. 6-16.

form of order to the seller was enacted with a like object. The sale without such an order form carries its illegality on its face. Its absence dispenses with the necessity of sending to examine the list of those registered to learn whether the seller is engaged in a legal sale. The requirement that the official forms can only be bought and obtained by one entitled to buy, whose name shall be stamped on the order form, and that after the sale the order form shall be recorded, effects a kind of registration of lawful purchasers, in addition to one of lawful sellers, and keeps selling and buying on a plane where evasion of the tax will be difficult."<sup>27</sup>

The idea that the order form provides a registration of lawful sellers (or conversely a device for the exposure of an unlawful seller) is even more appropriate in the case of the marihuana laws where the "recording" of the seller and of the sale takes place prior to the sale.

It is clear from the legislative history that there are two fundamental and equally important objectives of the statute. One is raising revenue and making it difficult for those who would use marihuana for illicit purposes to acquire it. Insofar as this objective is met by the order form, the requirement seeks to deal with the transferee and requires his name and address. If the only concern of the law was acquisition, there would be no need to obtain the name of the transferor. Cf. the scheme of the Narcotic Drug Act discussed below. The other and equally important objective of the Act is "publicizing dealings in marihuana

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<sup>27</sup> Hester, statement before the House Committee on Ways and Means on H.R. 6385, 75th Cong., 1st Sess., at pp. 12-13, quoting *Nigro v. United States*.

in order that the traffic may be effectively taxed and controlled." <sup>28</sup> Insofar as this second objective is met by the order form requirement, the requirement seeks information about transferors.

The Act seeks information about "dealings", not just about transferees. Part of this information is the name and address of the transferor. This information must be thought of as essential to the functioning of the order form section. The government seeks information about the "dealings" of the parties and seeks it before it will permit the "deal" to be completed. The government is as interested in the source of marihuana as it is in its destination. The revenue aspect of a particular transaction is clearly met by the requirement on the transferee of paying the tax prior to the sale. The requirement on the transferor of self-exposure by means of the order form is solely related to the law enforcement aspect of the statute. In this regard it is disclosure of violators which is sought. As Mr. Hester stated:

"... As an additional means of bringing the marihuana traffic out into the open, the bill also makes it illegal, with certain exceptions, to transfer marihuana except in pursuance of a written order form setting forth the facts surrounding the transaction. Substantial criminal penalties are imposed for violating the order form or registry provisions of this bill." <sup>29</sup>

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<sup>28</sup> Hester, Statement before the House Committee on Ways and Means on H.R. 6385, 75th Cong., 1st Sess. (1937), at p. 7.

<sup>29</sup> *Ibid.* at pp. 7-8. Essentially the same statement appears in Report No. 900 of the Senate Committee on Finance, to accompany H.R. 6906, 75th Cong., 1st Sess. (1937) at p. 3.

It was further intended that the functioning of the federal law should aid the enforcement efforts of the states. Although most of the states had legislation on the subject, there appeared to be a need for legislation which would enable the federal government to assist the states in their law enforcement efforts.<sup>30</sup> This explains the provisions of the law which provide the names of transferors of marihuana to state law enforcement officials and compel transferors to maintain copies of order forms for display to state law enforcement officials.

This examination of the development of the act reveals that it was a clear purpose of the act to compel a proposed transferor of marihuana to expose his behavior fully to the inspection of state and federal law enforcement officials. If he was an illicit transferor he was given the choice of disobeying federal law and risking serious penalties or of complying and subjecting himself to certain prosecution under state law and probably under the federal law itself (e.g. as an unregistered transferor). The act must therefore be thought of as an integrated whole, one of whose purposes is to compel a transferor to reveal incriminating information to the government about his marihuana transaction, through the agency of the transferee, and to maintain incriminating evidence of this transaction in the form of his copy of the order form.

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<sup>30</sup> Statement of Harry Anslinger, Commissioner of the Bureau of Narcotics to Hearings of the House Committee on Ways and Means on H.R. 6385, 75th Cong., 1st Sess. (1937) at pages 26, 31, and exhibit at p. 40.

## *2. The Privilege Applies to the Acts Required of a Transferor*

The Marihuana Tax Act has, as one of its principal purposes, exposure of the identity of transferors of marihuana to the scrutiny of federal and state law enforcement officials. A principal method for achieving this end is the order form requirement. See Point 1 above. The Act requires that the identity of a transferor be on file with the government prior to any transfer and that evidence of the completed transfer remain in the possession of the transferor for examination by federal and state law enforcement officials (§4742). The requirements upon the transferor are thus two. He must provide his name and address to the transferee so that the transferee, acting as the statutory agent of the government for procuring this information, will transmit it to the government prior to the sale. The transferee must also accept from the transferor, the government's statutory agent for insuring its delivery to the transferor, evidence of a completed transaction and keep this evidence for inspection of law enforcement officials. If a potential transferor is unregistered, as is petitioner, he is in effect required to tell the government that he is in the process of committing federal and state crimes, and then required to maintain evidence of his completed crime in order to assist law enforcement officers in his apprehension and prosecution. It is difficult to conceive of a situation more clearly within the protection of the Fifth Amendment privilege against self-incrimination.

As petitioner has demonstrated, it is this exposure of the transferor to law enforcement that the statute seeks. In judging the constitutionality of the statute both aspects of a transferor's obligation, the production of information

and the maintenance of evidence, must be considered. As this Court has held, the constitutionality of a statute, with regard to self-incrimination dangers, "may properly be determined only after assessment of the hazards of incrimination which would result from 'literal and full compliance' with all the statutory requirements."<sup>31</sup>

The privilege against self-incrimination clearly applies to the marihuana statute. *Leary v. United States*, *supra*. As *Leary*, *Marchetti*, *Grosso* and *Haynes* have shown, the privilege applies to a requirement of supplying incriminating information to the government in an ostensibly non-criminal proceeding where, as here, the area involved is "permeated with criminal statutes" and the group of persons involved is one "inherently suspect of criminal activities."<sup>32</sup> This is precisely petitioner's situation.

The mere fact that the government has, for its own purposes, chosen to make the transferee its agent for procuring the information which it seeks from the transferor, does not eliminate the self-incrimination aspect of the situation. Petitioner is clearly compelled by the government to provide it with incriminatory information. The transferee is compelled to seek it for conveyance to the government and the transferor is compelled to supply it for conveyance to the government. Afterwards the transferor is compelled to maintain evidence of his act and to produce it with self-incriminatory results on demand of the government. If the introduction of an involuntary intermediary

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<sup>31</sup> *Grosso v. United States*, 390 U.S. 64, 67 (1968), quoting *Albertson v. SACB*, 382 U.S. 70, 78.

<sup>32</sup> *Marchetti v. United States*, 390 U.S. 39, 47 (1968), quoting *Albertson v. SACB*, 382 U.S. 70, 79.

into a situation where the privilege so clearly applies could vitiate the privilege, then clearly the privilege could be completely defeated through the use of adroit legislation.<sup>23</sup>

The court below held that the privilege was personal and that the transferor was attempting to take advantage of the transferee's privilege. *United States v. Buie*, 407 F.2d 905, 907 (2d Cir. 1969). The court cited *Hoffa v. United States*, 385 U.S. 293 (1967). Petitioner agrees that the privilege is personal. It is clear, however, that petitioner is seeking to assert his own privilege as transferor and not that of the transferee. Simply because information reaches the government through the transferee does not mean that all privileges associated with the information belong to the transferee. For example, disclosure of the transferor's name is incriminating to the transferor and the transferee would not normally have sufficient interest to claim the privilege with respect to it. An analogous case which deals with this point is *Helvering v. Davis*, 301 U.S. 619 (1937). That case involved a challenge to the constitutionality of the Social Security Act. A shareholder of a corporation sued to enjoin the corporation from withholding taxes on employee's wages. The Commissioner of Internal Revenue, as intervenor, argued that the corporation and, therefore, the shareholder, was merely a collecting agent with no interest of its own to present to the court. The district court agreed with this; the Court of Appeals reversed on other grounds. The Supreme Court reversed, reinstating the district court opinion. It is of

<sup>23</sup> This reasoning was applied by the court in *United States v. Simon*, Docket No. 67 CR 45 (W.D. Wisc. July 16, 1969), in dismissing an indictment against a marihuana transferor. The court applied the reasoning of *Leary* to a transferor. The opinion is annexed hereto as Appendix C.

course true that one may assert the privilege only with respect to one's own interests, but the person who finally conveys the information to the government is not necessarily the one whose interests are involved.

The government often works through involuntary, unpaid agents, particularly in the tax area. It was long ago held that this is constitutional. In *National Bank v. Commonwealth*, 76 U.S. 353 (1869) and *Merchants Bank v. Pennsylvania*, 167 U.S. 461 (1897), the Supreme Court held that a state could levy a tax on the shares of stock in a bank and compel the bank to pay the tax. Since a state could not tax a national bank, the state statutes were invalid if the tax was on the bank itself rather than on the shares. The Court held that making the bank the involuntary agent for the collection of taxes due from shareholder was perfectly proper, and did not convert the tax into one upon the bank itself. Indeed, in *National Bank v. Commonwealth*, 76 U.S. 353, 361 (1869) the Court noted that "[i]n the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation."

The reasoning of these cases applies to petitioner's situation. The government has made the transferee its agent for collecting information and dispensing incriminating evidence. There is no reason why information should be treated any differently than taxes in this regard. The government has presumably chosen the transferee as its agent because use of that method provides access to the transferor, the real object of concern (with respect to his half of the transaction), who might otherwise remain hidden. The interest involved and the owner of the privilege re-

mains the transferor in spite of the introduction of the agent.

The critical element in the availability of the privilege is coercion and compulsion as opposed to voluntariness. As the Supreme Court held in *Hoffa v. United States*, 385 U.S. 293, 304 (1966), "a necessary element of compulsory self-incrimination is some kind of compulsion." In *Hoffa*, the defendant had made incriminating admissions to a trusted confidant, not knowing that the confidant had become an agent of the federal government. In rejecting defendant's claim that his privilege against self-incrimination had been violated, the Court held:

"In the present case no claim has been or could be made that the petitioner's incriminating statements were the product of any sort of coercion, legal or factual. The petitioner's conversations with Partin and in Partin's presence were wholly voluntary. For that reason, if for no other, it is clear that no right protected by the Fifth Amendment privilege against compulsory self-incrimination was violated in this case." *Hoffa v. United States*, 385 U.S. 293, 304.

The *Hoffa* situation is clearly not petitioner's situation. The marihuana tax statutes are replete with compulsion and legal coercion. A transferor may not by law transfer marihuana unless he insures that his name is given to the government for law enforcement use. The defendant in *Hoffa* had his choice about giving information to the agent; the transferor of marihuana has no choice. The transferee in *Buie* did not know Buie's name (App. 6-7; R. 16-17, 206); he did not procure a form (App. 5). For petitioner to comply with the law he would have been required to

enter into the order form process and to insure that information, incriminating to himself, reached the government. This process includes conveying incriminating information to the government by way of the transferee and receiving the incriminating order form from the government through the transferee, all done under compulsion of law.<sup>34</sup> Petitioner's conviction as a transferor of marihuana is clearly protected by the Fifth Amendment privilege against self-incrimination.

3. *The Privilege Protects a Transferor of Marihuana Even if It Does Not Protect a Transferor of Narcotic Drugs*

The Court of Appeals affirmed this case below relying exclusively on the holding in *United States v. Minor*, 398 F.2d 511 (2d Cir. 1968), which held that conviction of a transferor of narcotic drugs not pursuant to an official written order form in violation of 26 U.S.C. 4705(a), did not violate the privilege against self-incrimination as developed in *Marchetti*, *Grosso* and *Haynes*. *Minor* turns expressly on the structure of the statutory scheme of the narcotic drug laws. The court in *Minor* found that the narcotic drug statutes are readily separable into incriminating and non-incriminating elements. The court in *Buie* rejected petitioner's argument that the marihuana statutes

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<sup>34</sup> It does not eliminate the compulsion to say that petitioner has the "choice" of not engaging in the proscribed conduct. The Court has expressly rejected this reasoning. Moreover, the privilege is available for both past and future acts, providing the dangers are real and not "trifling or imaginary". *Marchetti v. United States*, 390 U.S. 39, 51-55.

were not separable in that way, and held that the *Minor* reasoning applied to the marihuana case.<sup>35</sup>

The transfer provision of the narcotic drug laws is 26 U.S.C. 4705. This section makes it unlawful to transfer narcotic drugs to one who has not obtained a Treasury Department form for that purpose; 26 U.S.C. 4742 imposes the same requirement for transfer of marihuana. The vital difference lies in the process of obtaining the form and the process by which incriminating information is made available to the Treasury Department. Section 4705(f) directs the Secretary of the Treasury to prepare forms, which will be supplied only to persons who have registered and paid the tax under 26 U.S.C. 4721 and 4722. At the time of obtaining the form, the name of the purchaser only is placed on the form and recorded by the Treasury Department. A seller is then forbidden by 26 U.S.C. 4705 to sell except to a purchaser who presents such a form with the purchaser's name inscribed. Following the sale, the seller is then required, by 26 C.F.R. §151.201, to forward a copy of the form to the Treasury Department. The sale of narcotic drugs is thus broken up into several discrete steps: (1) presentation of the buyer's name to the government by the buyer in order to procure a slip; (2) sale by the seller on presentation of a slip; (3) presentation of the seller's name to the government by the seller after the sale. This division was essential to the Court's reasoning in *Minor*. In considering the limited requirements of 26 U.S.C. 4705, the Court of Appeals reasoned:

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<sup>35</sup> In addition the *Buie* court applied the other important aspect of the *Minor* decision to the marihuana area and held that the marihuana statutes were not aimed at a class "inherently suspect of criminal activity." This issue has been dealt with in Point B above.

" . . . And, a seller's failure to fill out or retain the order form in no way affects the statutory purpose of limiting sales to purchasers who are duly authorized to deal in narcotic drugs. Thus, we conclude as the Court did in *Nigro* that: 'To punish him [the seller] for this misuse [or, in the instant case, lack of use] of an order form is not to punish him for not recording his own crime.' 276 U.S. at 350-351, 48 S. Ct. at 394." *United States v. Minor*, 398 F.2d 511, 515.

Thus, in the narcotic drugs statutes the requirement of sale only on presentation of an order form, and the self-incriminatory act of submitting one's name to the government, are completely separate. The Court reasoned that since one may obey the former requirement without obeying the latter it is proper to convict for violating the former requirement. However, the marihuana statute, 26 U.S.C. 4742(c), expressly requires that the name of the seller be recorded on the form and in the records of the government before the form is issued. Therefore, in order for a seller to satisfy the §4742 requirement of sale of marihuana only to the possessor of a form, the seller must insure that his, i.e. the seller's, name is recorded with the government prior to the sale. Here, the self-incrimination is an inseparable part of the crime charged, and the seller cannot satisfy the requirement of §4742 without incriminating himself. The *Marchetti* and *Leary* reasoning rather than the *Minor* reasoning therefore applies.

**Conclusion**

For the foregoing reasons the judgment below should be reversed in all respects.

Respectfully submitted,

DAVID A. DIAMOND

HAROLD J. ROTHWAX

*Counsel for the Petitioner*

September, 1969

APPENDICES

## Appendix A

### Statutes Involved:

26 U. S. C. 4741-4776

#### §4741. Imposition of tax

(a) Rate.—There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.—Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, \$1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, \$100 per ounce of marihuana or fraction thereof.

(b) By whom paid.—Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax. Aug. 16, 1954, c. 736, 68A Stat. 560.

#### §4742. Order forms

(a) General requirement.—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the

person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) *Exceptions.*—Subject to such regulations as the Secretary or his delegate may prescribe, nothing contained in this section shall apply—

(1) *Professional practice.*—To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, in the course of his professional practice only: *Provided*, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of 2 years from the date of the transfer of such marihuana, and subject to inspection as provided in section 4773.

(2) *Prescriptions.*—To a transfer of marihuana, made in good faith by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753: *Provided*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner who issues the same: *Provided further*, That such dealer shall preserve such prescription for a period of 2 years from the day on which such prescription is filled, so as to be readily accessible for inspection by the officers, employees, and officials mentioned in section 4773.

(3) *Exportation.*—To the sale, exportation, shipment, or delivery of marihuana by any person within the United States, any Territory; the District of Columbia, or any of the insular possessions of the United

States, to any person in any foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) Government and state officials.—To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the Department of Defense, the Public Health Service, and for Government, State, Territorial, District, county, or municipal or insular hospitals or prisons.

(5) Certain seeds.—To a transfer of any seeds of the plant *Cannabis sativa* L. to any person registered under section 4753.

(c) Supply.—The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such forms shall be sold shall be fixed by the Secretary or his delegate, but shall not exceed 2 cents each. Whenever any such forms are sold, the Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same.

(d) Preservation.—Each such order form sold by the Secretary or his delegate shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any per-

son who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of 2 years so as to be readily accessible for inspection by an officer or employee mentioned in section 4773. The copy given to the purchaser shall be retained by the purchaser and preserved for a period of 2 years so as to be readily accessible to inspection by any officer or employee mentioned in section 4773. The second copy shall be preserved in the records of the internal revenue district.

(e) Exemption of certain transfers to millers.—Nothing in this section shall apply to a transfer of the plant *Cannabis sativa* L. or any parts thereof from any person registered under section 4753 to a person who is also registered under section 4753 as a taxpayer required to pay the tax imposed by paragraph (6) of section 4751. Aug. 16, 1954, c. 736, 68A Stat. 560.

#### §4743. Affixing of Stamps (omitted)

#### §4744. Unlawful possession

(a) Persons in general.—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

(b) Government and state officials.—No liability shall be imposed by virtue of this section upon any duly authorized officer of the Treasury Department engaged in the enforcement of this part, or upon any duly authorized officer of any State, or Territory, or of any political subdivision thereof, or the District of Columbia, or of any insular possession of the United States, who shall be engaged in the enforcement of any law or municipal ordinance dealing with the production, sale, prescribing, dispensing, dealing in, or distributing of marihuana. Aug. 16, 1954, c. 786, 68A Stat. 562; July 18, 1956, c. 629, Title I, §101, 70 Stat. 567.

#### §4745. Forfeitures

(a) Ownership by violators.—Any marihuana which may be seized by the United States Government from any person or persons charged with any violation of this part shall upon conviction of the person or persons from whom seized be confiscated by and forfeited to the United States.

(b) Unknown ownership.—Any marihuana seized or coming into the possession of the United States in the enforcement of this part, the owner or owners of which are unknown, shall be confiscated by and forfeited to the United States.

(c) Disposal.—The Secretary or his delegate is hereby directed to destroy any marihuana confiscated by and forfeited to the United States under this section or to deliver such marihuana to any department, bureau, or other agency of the United States Government, upon proper application therefor, under such regulations as may be prescribed by the Secretary or his delegate.

(d) Other laws applicable.—Except as inconsistent with the provisions of this part, all the provisions of internal revenue laws relating to searches, seizures, and forfeitures are extended to include marihuana. Aug. 16, 1954, c. 786, 68A Stat. 562.

§4746. Cross references (omitted)

§4751. Imposition of tax

Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities, and thereafter on or before July 1 of each year, pay the following special taxes respectively:

(1) Importers, manufacturers, and compounders.—Importers, manufacturers, and compounders of marihuana, \$24 a year;

(2) Producers.—Producers of marihuana (except those included within paragraph (4)), \$1 a year, or fraction thereof, during which they engage in such activity;

(3) Physicians, dentists, veterinary surgeons, and other practitioners.—Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, \$1 a year, or fraction thereof, during which they engage in any of such activities;

(4) Persons engaged in research, instruction, or analysis.—Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, \$1 a year, or fraction thereof, during which he engages in such activities;

(5) Persons not otherwise taxed.—Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, \$3 a year: *Provided*, That any person who

has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section;

(6) Millers.—Any person who at a mill manufactures or produces from the plant *Cannabis sativa* L. any fiber or fiber products, \$1 a year, or fraction thereof, during which he engages in such activities.

Aug. 16, 1954, c. 736, 68A Stat. 563.

#### §4752. Computation and liability for tax

(a) Computation of tax.—Where a tax under paragraph (1) or (5) of section 4751 is payable on July 1 of any year it shall be computed for 1 year; where any such tax is payable on any other day it shall be computed proportionately from the first day of the month in which the liability for the tax accrued to the following July 1.

(b) Liability in case of activities in more than one place.—In the event that any person subject to a tax imposed by section 4751 engages in any of the activities enumerated in such section at more than one place, such person shall pay the tax with respect to each such place.

(c) Liability in case of more than one activity by same person at same time.—Except as otherwise provided, whenever more than one of the activities enumerated in section 4751 is carried on by the same person at the same time, such person shall pay the tax for each such activity, according to the respective rates prescribed. Aug. 16, 1954, c. 736, 68A Stat. 563.

#### §4753. Registration

(a) In general.—Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register

his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

(b) Special requirements for millers.—The Secretary or his delegate shall not permit the registration of any person under this section as a person required to pay the tax imposed by paragraph (6) of section 4751, unless in the opinion of the Secretary or his delegate such person (or if a corporation, each officer thereof) is a person of good moral character and unless in the opinion of the Secretary or his delegate such person is a person of suitable financial standing, intends to engage in good faith in the business of manufacturing or producing fiber or fiber products from the plant *Cannabis sativa* L. on a commercial basis, and is not seeking registration under this section for the purpose of facilitating the unlawful diversion of marihuana. Any person who is registered under this section and has paid the tax imposed by paragraph (6) of section 4751 shall afford officers and employees designated by the Secretary or his delegate ready access at all times to any part of the premises of the mill or other premises of such person and the right to inspect any and all books, papers, records, or documents connected with the activities of such person in dealing in, manufacturing, and processing *Cannabis sativa* L. and fiber or fiber products thereof, and the handling of marihuana. The Secretary or his delegate may cancel or may refuse to renew, after notice and opportunity for hearing, the registration of any such person if he finds that such person has not complied or is not complying with the requirements of this subsection, or if he finds that grounds exist which would justify the refusal to permit the original registration of such person under this section. Aug. 16, 1954, c. 736, 68A Stat. 564.

#### §4754. Returns

(a) Registrants.—Any person who shall be registered under the provisions of section 4753 with the Secretary or

his delegate shall, whenever required to do so by the Secretary or his delegate, render a true and correct statement or return, verified by affidavits, setting forth the quantity of marihuana received or harvested by him during such period immediately preceding the demand of the Secretary or his delegate, not exceeding 3 months, as the Secretary or his delegate may fix and determine. If such person is not solely a producer, he shall set forth in such statement or return the names of the persons from whom said marihuana was received, the quantity in each instance received from such persons, and the date when received.

(b) Cross references.—(omitted)

§4755. Unlawful acts in case of failure to register and pay special tax

(a) Trafficking.—

(1) Liability.—It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 4751 to 4753, inclusive, to import, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax.

(2) Enforcement of liability.—In any suit or proceeding to enforce the liability imposed by this section or sections 4751 to 4753, inclusive, if proof is made that marihuana was at any time growing upon land under the control of the defendant, such proof shall be presumptive evidence that at such time the defendant was a producer and liable under this section as well as under sections 4751 to 4753, inclusive.

(b) Transportation.—Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, transport, or deliver any marihuana within any Territory, the District of Columbia, or any in-

sular possession of the United States, or from any State, Territory, the District of Columbia, or any insular possession of the United States into any other State, Territory, the District of Columbia, or insular possession of the United States. Nothing contained in this subsection shall apply—

(1) to any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive;

(2) to any common carrier engaged in transporting marihuana;

(3) to any employee acting within the scope of his employment for any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive, or to any contract carrier or other agent acting within the scope of his agency for such registered person;

(4) to any person who shall deliver marihuana which has been prescribed or dispensed by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753 and employed to prescribe for the particular patient receiving such marihuana;

(5) to any person carrying marihuana which has been obtained by the person from a registered dealer in pursuance of a written prescription referred to in section 4742(b) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, if the bottle or other container in which such marihuana is carried bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person issuing such prescription;

(6) to any person carrying marihuana which has been obtained by the person as a patient from a registered physician, dentist, or other practitioner in the course of his professional practice if such marihuana is dispensed to the patient for legitimate medical purposes; or

(7) to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

Aug. 16, 1954, c. 736, 68A Stat. 565; July 18, 1956, c. 629, Title I, §102, 70 Stat. 567.

§4756. Other laws applicable (omitted)

§4757. Cross references (omitted)

§4761. Definitions

When used in this part—

(1) Person.—The term “person” means an individual, a partnership, trust, association, company, or corporation, and includes an officer or employee of a trust, association, company, or corporation, or a member or employee of a partnership, who, as such officer, employee, or member, is under a duty to perform any act in respect of which any violation of this part occurs.

(2) Marihuana.—The term “marihuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative,

mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(3) Producer.—The term “producer” means any person who (A) plants, cultivates, or in any way facilitates the natural growth of marihuana; or (B) harvests and transfers or makes use of marihuana.

(4) Transfer or transferred.—The term “transfer” or “transferred” means any type of disposition resulting in a change of possession, but shall not include a transfer to a common carrier for the purpose of transporting marihuana.

Aug. 16, 1954, c. 736, 68A Stat. 565.

§4762. Administration In Insular Possessions (omitted)

§4771. Stamps (omitted)

§4772. Exemption from tax and registration

(a) Employees.—No employee of any person who has registered and paid a special tax as required in sections 4721 to 4726, inclusive, or sections 4751 to 4757, inclusive, acting within the scope of his employment shall be required to register and pay such special taxes.

(b) Government and state officials.—Officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the businesses described in section 4741 or activities enumerated in sections 4751 and 4752, shall not be required to register, nor pay special tax, but their right to this exemption shall be evidenced in such manner as the Secretary or his delegate may by regulations prescribe.

(c) Cross references.—(omitted)

#### §4773. Inspection of returns, order forms, and prescriptions

The duplicate order forms and the prescriptions, including the written record of oral prescriptions, required to be preserved under the provisions of section 4705(c) (2) and (e), and the order forms and copies thereof and the prescriptions and records required to be preserved under the provisions of section 4742, in addition to the statements or returns filed in the office of the official in charge of the internal revenue district under the provisions of sections 4732(b) or 4754, shall be open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana. The Secretary or his delegate is authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in the office of any official in charge of an internal revenue district to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States as shall be entitled to inspect the said statements or returns filed in the office of the official in charge of the internal revenue district, upon the payment of a fee of \$1 for each 100 words or fraction thereof in the copy or copies so requested. Aug. 16, 1954, c. 736, 68A Stat. 567; Aug. 31, 1954, c. 1147, §9, 68 Stat. 1004.

#### §4774. Territorial extent of law (omitted)

#### §4775. List of special taxpayers

The Secretary or any officer or employee designated by him is authorized to furnish upon written request, to any

person, a certified copy of the names of any or all persons who may be listed in the respective internal revenue districts as special taxpayers under the provisions of sections 4721 to 4726, inclusive, section 4702(a), section 4751, or section 4752, upon payment of a fee of \$1 for each 100 names or fraction thereof in the copy so requested. Aug. 16, 1954, c. 736, 68A Stat. 568.

§4776. Cross references (omitted)

## Appendix B

## APPENDIX B

TREASURY DEPARTMENT ORIGINAL  
Value Two (2) Cents  
UNITED STATES INTERNAL REVENUE

ORDER FORM FOR MARIHUANA, OR COMPOUNDS,  
MANUFACTURES, SALTS, DERIVATIVES, MIXTURES,  
OR PREPARATIONS UNDER THE MARIHUANA TAX ACT OF 1937.

MARIHUANA ORDER FORM NUMBER	A4877	DATE ISSUED BY COLLECTOR:	15
--------------------------------	-------	------------------------------	----

TO: \_\_\_\_\_  
\_\_\_\_\_

Sir:

Application having been presented and transfer tax in the amount of \$ \_\_\_\_\_ having been paid, as evidenced by transfer tax stamps affixed to the original hereof in accordance with the provisions of the Marihuana Tax Act of 1937 and regulations issued thereunder, you are authorized, in so far as the provisions of that Act and the regulations issued thereunder are concerned, to transfer to \_\_\_\_\_ to be delivered to him in person or consigned to him at \_\_\_\_\_, a quantity of marihuana not to exceed \_\_\_\_\_ ounces in the form of the following products:

ITEM	NAME OF PRODUCT OR PREPARATION	QUANTITY
1		
2		
3		
4		

AFFIX

STAMPS

HERE

Signed: \_\_\_\_\_ Collector,

By \_\_\_\_\_

NOTE: Not valid to authorize a transfer of marihuana unless signed by the collector and the full amount of transfer stamps indicated above are affixed to the original copy.

## Appendix C

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN  
67-CR-45

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UNITED STATES OF AMERICA,

*Plaintiff,*

—v.—

DONALD SIMON,

*Defendant.*

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OPINION AND ORDER

The government has filed a petition for reconsideration of an opinion and order entered herein on June 30, 1969, granting defendant's motion to dismiss both counts of an indictment charging him with violations of the Marihuana Tax Act, 26 U. S. C. §4741 et seq.

Count I of the indictment charged that defendant transferred a quantity of marihuana not pursuant to a written order on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate, in violation of 26 U. S. C. §4742(a). Count II of the indictment charged that defendant was a transferee of and transported and facilitated the transfer of a quantity of marihuana without having paid the tax imposed by 26 U. S. C. §4741(a), in violation of 26 U. S. C. §4744(a). Defendant's motion to dismiss both counts of the indictment was granted on the ground that the timely assertion of his privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States is a complete defense to the charges in the indictment.

With respect to Count II of the indictment which charges a failure to pay the transfer tax in violation of section 4744(a), the outcome is controlled by the decisions of the United States Supreme Court in *Leary v. United States*, 37 U. S. L. W. 4397 (U. S., May 19, 1969), and *United States v. Covington*, 37 U. S. L. W. 4412 (U. S., May 19, 1969). The government contends, however, that with respect to the privilege against self-incrimination, a prosecution for transferring marihuana not pursuant to a written order form, in violation of section 4742(a), is distinguishable from a prosecution for failure to pay the transfer tax, in violation of section 4744(a). The government asserts that the obtaining of a written order form by the transferee is at most an indication that the transferor intends to transfer marihuana illegally; that the transferor has until the time of the actual transfer an option not to transfer marihuana illegally; and that, therefore, the transferor's Fifth Amendment rights are not violated by the written order form requirement. In addition, the government directs the court's attention to two recent decisions. In *United States v. Buie*, 407 F. 2d 905 (2d Cir. 1969), cert. granted 37 U. S. L. W. 3493 (U. S., June 23, 1963), a timely assertion of the privilege against self-incrimination was held not to constitute a defense to a prosecution for violation of section 4742(a). In *United States v. Lawler*, — F. 2d — (7th Cir., July 10, 1969), a timely assertion of the privilege against self-incrimination was held not to constitute a defense to a prosecution for transferring narcotics not pursuant to a written order form in violation of section 4705(a).

The government's contention that a prosecution for violation of section 4742(a) is distinguishable from a prosecution for violation of 4744(a) because at most the written order form is an indication that the transferor intends to transfer marihuana illegally, which intention may be revoked prior to the actual time of transfer, is not persuasive. Section 4741(b) provides that the transfer tax shall

be paid by the transferee at the time he secures the written order form. It is the written order form which elicits and preserves incriminating information. Therefore, the transferee is in no different position than the transferor with respect to having a possibility of revoking an intention to acquire marihuana illegally. Mere possession of marihuana constitutes a crime in every state (see statutory authority collected in footnote 2 of the opinion and order entered herein on June 30, 1969). It appears that the transferee has an even longer period of time than the transferor to revoke his intention to possess marihuana since the transferor must necessarily acquire possession of the marihuana to be transferred prior to the transfer and the transferee's acquisition of the marihuana.

In *United States v. Buie, supra*, on which the government relies, the court relied on *United States v. Minor*, 398 F. 2d 511 (2d Cir. 1968) cert. granted 37 U. S. L. W. 3458 (U. S., June 2, 1969), which held that the privilege against self-incrimination was not available as a defense to a prosecution under section 4705(a) for the transfer of narcotics not pursuant to a written order form. In the opinion and order entered herein on June 30, 1969, I concluded that, with respect to the privilege against self-incrimination, a prosecution for violation of section 4742 (a) is distinguishable from a prosecution for a violation of 4705(a). Section 4742(c) provides that at the time the form is sold, the name and address of the proposed vendor, as well as the date of sale, the name and address of the purchaser and the amount of marihuana ordered must be made to appear on the written order form. Section 4705, however, does not require the name and address of the transferor to be placed on the order form. 26 C. F. R. §151.185 dealing with this section requires only that the size and number of packages and the date of sale must be made to appear on the written order form. Although 26 C. F. R. §151.201 requires the transferor to write his name

on the written order form and forward a triplicate copy to the narcotic district supervisor, this is not done until after the transaction is completed, and, therefore, the transferor can comply with the literal requirements of section 4705(a) without providing incriminating information.

With respect to *United States v. Buie*, *supra*, it should initially be observed that this decision was rendered prior to the Supreme Court's decisions in *Leary v. United States*, *supra*, and *United States v. Covington*, *supra*. Moreover, at least one pillar of *Buie* appears to have been undermined by *Leary* and *Covington*. In *Buie* the court concluded that section 4742(a) was not aimed at a class "inherently suspect of criminal activities", *Albertson v. Subversive Activities Control Board*, 382 U. S. 70, 79 (1965). In *Leary*, however, the Supreme Court concluded that under the Marihuana Tax statutory scheme persons required to pay the transfer tax constitute a class "inherently suspect of criminal activities". Section 4741(a) imposes the transfer tax on all transfers of marihuana which are required by section 4742 to be carried out pursuant to a written order form. Consequently all transactions for which a transfer tax is required are also transactions for which a written order form is required. Accordingly, if transferees required to pay the transfer tax are members of a class "inherently suspect of criminal activity", so also are transferors who are required to transfer marihuana pursuant to a written order form members of such a class.

In *Buie* the court concluded that since it is the transferee who places the incriminating information on the order form rather than the transferor, the transferor "cannot benefit from the privilege allegedly available to the [transferee]", 407 F. 2d at 907 (quoting from *United States v. Minor*, *supra* at 513). The court further concluded that the case of the transferor and the written order form requirement of section 4742(a) "is conceptually no

different from a prosecution based on incriminatory admissions voluntarily made to a police informant". *Id.* (citing *Hoffa v. United States*, 385 U. S. 293, 304, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966)).

I am unable to agree with the reasoning of the court in *Buie*. The court asserted that if the transferor were required to write his name on the written order form or if the transferor and transferee were each required to write his name on the written order form, the transferor's privilege against self-incrimination would be violated. I am unable to distinguish those situations from the dilemma posed for the transferor by section 4742(a). The transferor is placed in the position of either requiring that the transferee enter information on the form which will incriminate the transferor or violating section 4742(a). The section thus requires the transferor to see to it that incriminating information is provided to the authorities. It is irrelevant whose hand actually places the information on the form. The privilege against self-incrimination could be easily eroded if it could be circumvented by requiring a person to provide incriminating information to the government by means of a third party. It is noteworthy in this respect that the transfer tax requirement involved in *Leary* and *Covington* does not require the transferee to provide incriminating information directly to state and local authorities by whom he is in danger of being prosecuted. It merely requires him to furnish information to federal authorities which may incriminate him as to a state or local offense and requires the federal authorities to furnish this information to state and local authorities upon request.

Finally, the analogy suggested in *Buie* to incriminatory admissions voluntarily made to a police informant is unpersuasive. In the section 4742(a) situation, the government requires that the information be provided; it is the element of voluntariness which is lacking. In *Hoffa*, upon which the *Buie* court relied in making its comment, the

Supreme Court emphasized the voluntary character of the statements made.

*United States v. Lawler, supra*, relied upon by the government, followed *United States v. Minor, supra*, in holding that the privilege against self-incrimination is not available as a defense to a prosecution for transfer of narcotics not pursuant to a written order form in violation of section 4705(a). I conclude that *United States v. Lawler, supra*, is distinguishable from the present case for the same reasons that I have concluded that *United States v. Minor, supra*, is distinguishable. Nothing in the *Lawler* opinion dictates a different result here. In fact a careful reading of that opinion appears to support the view that the privilege against self-incrimination is available as a defense to a prosecution for violation of section 4742(a). In reaching its conclusion with respect to section 4705(a), the court in *Lawler* explained:

"As pointed out [in *United States v. Minor, supra*], the statute only prohibits the sale of narcotics to a purchaser who has not obtained an order form from the Treasury Department. Despite the serious hazard of self-incrimination to which the purchaser may be exposed in complying with such a requirement (see *Leary v. United States*, — U. S. — —), a seller in *Lawler's* position may not complain of a theoretical violation of the purchaser's rights. Defendant has not brought to the court's attention any regulations which would require the seller of narcotics to participate in or insure his own incrimination through the order form requirement, but to the extent that any regulation might jeopardize the constitutionality of section 4705(a) the regulation would have to give way in order that the statute may be saved. Cf. *Leary v. United States*, — U. S. — —." *United States v. Lawler, supra*, advance sheet opinion at page 6. (Emphasis added.)

I conclude that because of the requirement of section 4742(c) that at the time the written order form is obtained the name and address of the proposed vendor must be made to appear on the form, a copy of which is to be preserved in the records of the internal revenue district, section 4742(a) requires the transferor to "insure his own incrimination".

I adhere to the determination in the opinion and order entered herein on June 30, 1969, that the timely assertion of the privilege against self-incrimination constitutes a complete defense to a prosecution for violation of section 4742(a) as well as 4744(a).

For the reasons set forth above the petition for reconsideration is hereby denied.

Entered this 16th day of July, 1969.

By the Court:

JAMES E. DOYLE  
*District Judge*

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 271

MICHAEL BUIE, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT*

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BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals affirming the judgment of the district court is reported at 407 F. 2d 905.

## JURISDICTION

The judgment of the court of appeals was entered on March 12, 1969. On April 1, 1969, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to May 10, 1969, and the petition was filed on May 9, 1969. Certiorari was granted on June 23, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

**QUESTION PRESENTED**

Whether petitioner's privilege against self-incrimination was violated by his conviction for transferring marihuana not pursuant to a written order form, in violation of 26 U.S.C. 4742(a).

**STATUTES AND REGULATIONS INVOLVED**

The relevant statutes and regulations (26 U.S.C. 4741-4744, 4751, 4753-4755, 4771, 4773, 4775; 26 C.F.R. 152.63, 152.66, 152.105) are set forth in the Appendix, *infra*, pp. 21-27.

**STATEMENT**

A three count indictment filed in the United States District Court for the Southern District of New York charged petitioner with unlawfully transferring marihuana not in pursuance of a written order on a form issued by the Secretary of the Treasury, in violation of 26 U.S.C. 4742(a) (counts 1 and 2), and trafficking in marihuana, knowing it to have been unlawfully imported, in violation of 21 U.S.C. 176(a) (count 3). After a jury trial, petitioner was acquitted on counts one and three and convicted on count two, charging an unlawful transfer on May 18, 1967. On July 15, 1968, he was adjudged an addict and ordered committed for treatment and rehabilitation for an indefinite term not to exceed five years, pursuant to 18 U.S.C. 4253(a). The court of appeals affirmed, 407 F. 2d 905.

The evidence pertinent to count two showed that on May 8, 1967, undercover narcotics agents Dennis Nargi and Rafael Halperin were introduced to pe-

itioner by another individual, Charles Arlaus, from whom they had been securing marihuana. As a result of this meeting, Nargi purchased approximately one-half pound of marihuana from petitioner. The transaction occurred at petitioner's apartment in Manhattan. Ten days later Nargi and Halperin returned to the apartment to purchase hashish. Petitioner was unable to make the sale at that time, but furnished Nargi with a telephone number where he could be reached later that evening. When Nargi telephoned petitioner, they made arrangements to meet at First Avenue and Forsyth Street at 9 p.m. to conclude the proposed transaction. At that meeting petitioner informed Nargi that he could not obtain hashish but agreed to procure marihuana. He directed Nargi to drive to a nearby street corner. Once there, petitioner left the automobile. When he returned, he handed Nargi five packages, each containing marihuana, and Nargi gave him \$20. Nargi testified that he never tendered to petitioner the official order form required by statute for such a transaction (A. 4-5).

At trial, petitioner contended that compliance with the order form provisions of the Marihuana Tax Act would have compelled him to incriminate himself and, accordingly, that his timely assertion of the privilege against self-incrimination was a complete defense to the prosecution. The district court, relying upon *Rule v. United States*, 362 F. 2d 215 (C.A. 5), certiorari denied, 385 U.S. 1018, and two then unreported decisions of other judges in the Southern District of New York

(A. 4)<sup>1</sup>, rejected the contention. In affirming, the court of appeals considered petitioner's case indistinguishable from cases involving transferors of narcotics under 26 U.S.C. 4705(a). Relying upon its opinion in *United States v. Minor*, 398 F. 2d 511, certiorari granted, 395 U.S. 932 (No. 189, this Term), the court held that a transferor could comply with the requirements of Section 4742 without the hazard of self-incrimination (A. 14-16).<sup>2</sup>

#### ARGUMENT

##### INTRODUCTION AND SUMMARY

Petitioner was convicted of violating the order form requirement of the Marihuana Tax Act (26 U.S.C. 4741-4776) by transferring marihuana not in pursuance of a written order of the transferee on a form

<sup>1</sup> One, cited as *Burgos* has since been reported, *sub. nom. United States v. Reyes*, 280 F. Supp. 267. The second case, *United States v. Smith*, S.D. N.Y., No. 67 Cr. 893, decided March 5, 1968, involves a transferor of cocaine, in violation of 26 U.S.C. 4705(a) and 7237(b), and relies upon *Reyes*. It remains unreported.

<sup>2</sup> The court of appeals recognized that the marihuana order form requires the name of the transferor, whereas the narcotics order form does not. It concluded that this difference was not crucial, since the marihuana tax statute required the transferee to secure the form and did not provide that the transferor write his name on it in advance. The possible self-incrimination dilemma faced by the transferee, said the court, did not extend immunity to the transferor (A. 15-16).

The court made an additional observation, no longer apposite in the light of *Leary v. United States*, 395 U.S. 6. In concluding that the Marihuana Tax Act was not aimed at a class inherently suspect of criminal activities, the court pointed to the large number of legal registrants in the first year following enactment of the statute (3,665), rather than the current number, which has dwindled to 85 (A. 16).

issued by the Secretary of the Treasury (26 U.S.C. 4742(a)). His contention that conviction under Section 4742(a) violates his privilege against self-incrimination is premised on the principles announced by this Court in several recent cases involving federal tax statutes directed at conduct which is subject to a comprehensive system of State and federal criminal prohibitions. *Marchetti v. United States*, 390 U.S. 39; *Grosso v. United States*, 390 U.S. 62; *Haynes v. United States*, 390 U.S. 85; *Leary v. United States*, 395 U.S. 6. In each of those cases, the Court determined that the coexistence of the federal tax statute and the complex of criminal prohibitions imposed a dilemma on the individual whereby his compliance with the requirement of the federal tax law would create a "real and appreciable" risk of self-incrimination. *E.g.*, *Marchetti, supra*, 390 U.S. at 48-49. The Court held, therefore, that where such a risk exists, a timely assertion of the privilege against self-incrimination is a complete defense to a criminal prosecution for failure to comply with a requirement of the federal tax statute. See also *United States v. Covington*, 395 U.S. 57.

In light of the Court's rationale in *Leary, supra*, 395 U.S. at 16-18, it is beyond dispute, as petitioner argues at length (Br. 10-21), that disclosure of an individual's participation in a marihuana transaction subjects him to scrutiny and possible conviction under criminal statutes proscribing such transactions except among a small class of authorized persons. But that is the extent of petitioner's proper recourse to *Leary*

and its antecedents. Unlike those cases, the prosecution here does not rest on a statute with which the defendant could not comply without disclosing incriminatory information. Section 4742(a) does not require a prospective transferor of marihuana himself to disclose any information at all; it merely forbids him from making a transfer unless the transferee produces an order form which he has obtained from the Secretary of the Treasury.

Contrary to petitioner's argument, the fact that the *transferee* must disclose the name and address of the prospective transferor in order to secure an order form does not impose any obligation of *self-incrimination* on the transferor. Nothing in the statute requires the *transferor* to supply that information, and there is no basis for petitioner's assumption that such information can only be obtained from the transferor. Petitioner's privilege against compulsory self-incrimination is a personal right which is not offended by a taxing scheme that obliges a transferee of marihuana to disclose the source of his acquisition. Although an illicit transferor understandably would be reluctant to transfer marihuana to someone who is willing to identify him (cf. *Nigro v. United States*, 276 U.S. 332, 345-346), the restraint which the statute thus imposes on his activities involves no disclosures from him and infringes none of the values which the privilege against self-incrimination was designed to protect.

Since the receipt of an order form constitutes a complete defense to the statute under which petitioner was convicted, his self-incrimination contention gains

no support from the citation of another provision of the Act which requires a transferor who has received an order form to retain it for two years for inspection by narcotics agents (26 U.S.C. 4742(d)). The risk of self-incrimination, if any, which those subsequent requirements may impose on an unregistered transferor who complies with Section 4742(a) is a distinctly separate issue which may be raised as a defense by such a transferor in a prosecution for failure to comply with those requirements; the protection which the privilege might afford petitioner in those circumstances cannot be advanced to immunize his failure to comply with the primary requirement to receive an order form. In all events, the practical likelihood that an unregistered seller will receive an order form is so remote that the risk of self-incrimination which those subsequent provisions create can hardly be viewed as "substantial."

PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION  
WAS NOT VIOLATED BY HIS CONVICTION UNDER 26 U.S.C.  
4742(a) FOR TRANSFERRING MARIHUANA NOT PUR-  
SUANT TO A WRITTEN ORDER FORM

A. SECTION 4742(a) IMPOSES A DISCRETE OBLIGATION ON THE TRANSFEROR—TO TRANSFER MARIHUANA ONLY UPON RECEIPT OF THE TRANSFEREE'S ORDER EVIDENCING HIS PAYMENT OF THE FEDERAL TAX—WITH WHICH THE TRANSFEROR CAN FULLY COMPLY WITHOUT FURNISHING ANY INFORMATION TO THE GOVERNMENT.

As outlined by the Court in *Leary* (395 U.S. at 14-16), the Marihuana Tax Act has two principal subparts: a transfer tax, which includes the order form requirement, and an occupational tax.

Insofar as the *occupational* tax provisions (26 U.S.C. 4751-4757) are relevant here, every person who, *inter alia*, “ \* \* \* sells, deals in, dispenses, \* \* \* or gives away marihuana” is subject to an annual special tax (Section 4751) and must register his name and business address at the nearest district office of the Internal Revenue Service (Section 4753(a)).<sup>3</sup> Section 4755(a)(1) makes it unlawful for any person required to register and pay the special tax to engage, *inter alia*, in any of the forementioned activities without having complied with those requirements. As a seller of marihuana, petitioner was required to register and pay the occupational tax, but did not do so (Br. 27).<sup>4</sup>

The prohibition in 26 U.S.C. 4742(a) against *transfer* of marihuana except in pursuance of a written order form complements the marihuana transfer tax by inhibiting transactions in respect of which that tax has not been paid. Cf. *United States v. Sanchez*, 340 U.S. 42, 45; *United States v. Doremus*, 249 U.S. 86, 94-95. With certain narrow exceptions, not relevant here,<sup>5</sup> all

<sup>3</sup> Registrants are also required to file periodic returns showing the source and disposition of all marihuana acquired (Section 4754(a), 26 C.F.R. 152.91-152.99).

<sup>4</sup> Subsections 4751 (1)-(4), (6), provide varying annual tax rates for specified occupational categories such as importers, producers, physicians, researchers, and millers. Other persons, like petitioner, who “deal in” marihuana but do not fall in any of the specified categories, are taxed under Section 4751(5) at a rate of \$3 per year.

<sup>5</sup> The exceptions, contained in Section 4742(b), include transfers by or under prescription of a medical practitioner; legal

transfers of marihuana are subject to a tax, which is to be paid in advance by the transferee at the time he obtains an order form (Section 4741; 26 C.F.R. 152.66-152.69).<sup>6</sup> Payment is evidenced on the order form by the attachment of revenue stamps in the amount of the tax, which varies with the status of the transferee: transferees who have registered and paid the occupational tax pay a transfer tax of \$1 per ounce; nonregistered transferees must pay a \$100 per ounce tax designed to discourage the acquisition of marihuana by illicit users (Sections 4741(a), 4743).<sup>7</sup>

The order form is executed in triplicate, and must contain the names and addresses of the prospective transferor and the prospective transferee and the amount of marihuana to be transferred (Section 4742 (c), (d)); the transferee is required to furnish this information, in an application accompanied by payment of the tax, in order to obtain the form (26 C.F.R. 152.66). One copy of the form is retained for two years by the district director to be available for inspection by federal, State, and local narcotics agents (Section 4742(d), 4773). The original, to which the revenue stamps are affixed, and the other copy of the

exportation to foreign countries, transfers to government officials, and transfers of marihuana seeds to persons registered under Section 4753.

<sup>6</sup> A transferor who transfers marihuana without an order form, in violation of Section 4742(a), is secondarily liable for the transfer tax. Section 4741(b).

<sup>7</sup> See H. Rep. No. 792, 75th Cong., 1st Sess., pp. 1-3; S. Rep. 900, 75th Cong., 1st Sess., pp. 2-3. In *Leary*, the Court held that Congress did contemplate that a nonregistrant should be able to obtain an order form and prepay the \$100 per ounce transfer tax (395 U.S. at 20-26).

order form are issued to the transferee, who tenders the original to the transferor at the time of the transaction (Section 4742(d), 26 C.F.R. 152.64, 152.69). Both transferor and transferee must retain the form for two years and permit it to be inspected by any federal or state narcotics official (Sections 4742(d), 4773). The marihuana statutes impose no obligation on the transferor (or on the transferee) to notify the government that the transaction has taken place (compare 26 C.F.R. 151.201 (narcotics)).

Section 4744(a) makes it unlawful for a transferee required to pay the transfer tax either to acquire marihuana without having paid the tax or to transport or conceal any marihuana so acquired. The Court in *Leary*, finding that the prepayment of the tax in compliance with that Section was inseparable from the procedure for securing an order form, held that the obligation thus imposed, in the case of an unregistered transferee, to come forward and identify himself as a prospective transferee of marihuana created an appreciable risk of self-incrimination. The Act, however, neither requires nor contemplates that a transferor of marihuana shall apply for an order form, and consequently he is under no obligation to make a self-incriminating disclosure.

The differing nature of the requirement imposed by Section 4742(a) significantly distinguishes this case from the *Marchetti-Leary* line of cases on which petitioner relies. In each of those cases, the Court found that " 'literal and full compliance' with all the statu-

tory requirements" on which the prosecution was premised would have compelled the defendant himself to provide incriminating information. In *Grosso*, for example, which involved a prosecution for willful failure to pay the federal wagering excise tax, it was determined that the obligation to pay the tax and the correlative duty to file monthly returns on the results of wagering activities "must be considered inseparable for purposes of measuring the hazards of self-incrimination which might stem from payment of the excise tax" (390 U.S. at 65). Section 4742(a), on the other hand, imposes no duty on a transferor of marihuana to come forward with any information at all. The transferor's receipt of the order form, without more, forecloses conviction under the statute. Transfer of marihuana to a transferee who does not furnish an order form, without more, is a completed offense under Section 4742(a).<sup>8</sup>

We do not understand petitioner to contend that merely requiring him to receive an order form would

<sup>8</sup>The government proved affirmatively that no order form was furnished to petitioner in this case; it did not rely on the presumption available under 26 U.S.C. 7491, which provides that "In the absence of the production of evidence by the defendant that he has complied with \* \* \* section 4742 relating to order forms, he shall be presumed not to have complied with \* \* \* such section \* \* \*." This presumption, which was codified in a distant chapter of the Internal Revenue Code, is rarely invoked. In light of the Act's prohibition against transfers by unregistered transferors (Section 4755(a)(1)), reliance on this presumption in a prosecution against an unregistered transferor under Section 4742(a) would present problems of self-incrimination. But the mere fact that the presumption is available in no way enlarges the obligation which Section 4742(a) imposes on a transferor. See also pp. 15-18, *infra*.

itself violate his privilege against self-incrimination. Indeed, the distinction he makes between Section 4742 and the cognate provision of the Harrison Narcotics Act (26 U.S.C. 4705(a)) would seriously undermine such a contention (Br. 32-34). Nor does petitioner argue that the order form requirement is not an appropriate vehicle to effectuate the revenue-producing and regulatory purposes of the transfer tax. Cf. *United States v. Doremus*, 249 U.S. 86, 94-95; *Nigro v. United States*, 276 U.S. 332, 350-351. What he does object to is the fact that the order form procedure established by Section 4742 requires that the prospective transferee identify the intended transferor in order to secure an order form. We consider in the following section petitioner's argument that the incriminatory disclosures by the *transferee* violate the transferor's privilege against compulsory self-incrimination.

**B. A TRANSFEROR'S PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT VIOLATED BY THE FACT THAT A TRANSFEEE MUST IDENTIFY THE TRANSFEROR IN ORDER TO OBTAIN AN ORDER FORM**

The fact that an illicit transferor of marihuana may be incriminated by the transferee's furnishing his name and address for inclusion on the order form does not, by itself, establish a violation of the transferor's Fifth Amendment privilege. It is manifest from this Court's opinions that the privilege is a personal right which the individual may invoke in his own behalf when he is asked to give information to the government. See *Miranda v. Arizona*, 384 U.S. 436; *Geo. Campbell Painting Corp. v. Reid*, 392 U.S. 286; *Rogers v. United States*, 340 U.S. 367; compare

*United States v. Wade*, 388 U.S. 218, 261 (opinion of Fortas, J.). We are unaware of any authority which would allow an individual to invoke his own privilege to prevent the government from securing information about his activities from another person.

Petitioner attempts to hurdle that obstacle to his conclusion with the creative argument that the transferee's disclosure of the transferor's identity is the product of some form of compulsion by the government upon the transferor (Br. 27-32). Thus, petitioner asserts, the statute imposes a "requirement" on the transferor to provide his name and address to the transferee "so that the transferee, acting as the statutory agent of the government for procuring this information, will transmit it to the government" (Br. 27). This characterization of the order form procedure, however, is fundamentally unsound for several reasons.

Nothing in the order form, statute or regulations "requires" a transferor to disclose his name and address to the transferee; the transferor cannot "require" the transferee to obtain an order form; and the transferee cannot "require" the transferor to complete the transaction even if he produces an order form. To be sure, Section 4742(a) permits transfers only to persons who have obtained an order form and thus have demonstrated that they know the transferor's name and address. But this consequence of the statute provides support for petitioner's self-incrimination argument only if it is assumed, as petitioner does (Br. 10), that a transferee necessarily must secure that information from the transferor himself.

The reliability of such an assumption, we submit, is much too uncertain to sustain petitioner's argument. The facts of the marihuana cases which reach this Court refute any notion that illicit sellers are characteristically anonymous transients. To the contrary, the cases support the hypothesis that marihuana vendors are likely to be known among regular clients, through whom new purchasers, including undercover agents, are introduced to him. In the present case, for example, the agents ascertained petitioner's address when they were taken to his apartment by Charles Arlaus, a friend of petitioner from whom the agents had previously acquired marihuana. At that meeting, which was 10 days prior to the transfer on which the conviction was based, Arlaus introduced petitioner to the agents as "Mike". The only fact which remained to be learned within those 10 days in order to obtain an order form was petitioner's last name. The record does not show whether the agents learned petitioner's name from petitioner himself or from any of the numerous other sources which could have supplied that fact. But it is sufficient here to conclude that such other sources are available to a prospective transferee; for unless the transferee necessarily must secure the incriminating information from the transferor, it cannot be said that the order form requirement imposes any obligation of *self-incrimination* on the transferor.

Even in those situations where the transferor himself reveals his name and place of business to the transferee, we cannot agree that that disclosure is the product of any compulsion by the government. The

relevance of that information to the transaction is not a malicious creation of the government; it is frequently in the interest of a seller, even of contraband goods, to make some such disclosure in order to encourage the buyer's subsequent patronage. Such voluntary statements, even if thereafter repeated to the government, are not protected by the privilege against compulsory self-incrimination. See *Hoffa v. United States*, 385 U.S. 293, 304. Nor is it helpful to characterize the transferee as the "statutory agent" of the government. Whatever conclusion petitioner seeks to draw from that label presumably would be required in every case in which an applicant for a federal license was obliged to disclose the names of those who willingly deal with him. In sum, there is no basis for assuming that compliance with Section 4742(a) requires the transferor to disclose any information or that any disclosures which he may make to the transferee incident to the marihuana transaction would be "compelled" within the scope of the Fifth Amendment protection.

C. THE FACT THAT THE STATUTE REQUIRES A TRANSFEROR TO RETAIN THE ORDER FORM FOR INSPECTION DOES NOT PROVIDE ANY SUPPORT FOR PETITIONER'S SELF-INCRIMINATION DEFENSE TO HIS FAILURE TO RECEIVE THE ORDER FORM.

Petitioner attempts to support his challenge to Section 4742(a) by pointing to the risks of incrimination which may be created by another provision requiring a transferor who complies with Section 4742(a) to retain the order form for two years and make it available for inspection by narcotics agents (Section 4742(d)). But whatever hazards those subsequent obliga-

tions involve for an unregistered transferor<sup>9</sup>—and we believe that such hazards realistically do not exist—they have no effect on petitioner's case. A transferor's retention of the order form is not necessary to achieve “‘literal and full compliance’ with all the statutory requirements” in a prosecution under Section 4742(a). We may properly stop at assessing the incriminatory effect of those obligations which an individual would have had to discharge in order to have satisfied the requirements of the statute on which the prosecution is based. In the present case, the only requirement imposed on petitioner was to receive an order form, or refrain from making a transfer in its absence. Receipt of the order form, without more, would have been a complete defense to the charge.

The argument which petitioner bases on the retention and inspection requirements is unsound for the further reason that it seeks to enlarge the self-incrimination protection which might be available to an unregistered transferor who actually subjects himself to those requirements by receiving an order form. An unregistered transferor in that situation could elect to avoid any risk of self-incrimination by refusing to

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<sup>9</sup> It seems apparent that the only risk of incrimination would arise from the transferor's demonstrating his possession of the form—as evidencing its receipt incident to a transfer of marijuana—rather than the disclosure of any information which the form contains. The government is in possession of all such information, before the transferor receives the form, by reason of the district director's retention of one of the copies. See p. 9, *supra*.

comply with the retention and inspection requirements, and the privilege could be raised as a defense in any prosecution based on his non-compliance.<sup>10</sup> In such a prosecution, the defense would either be sustained—in which event it is clear that a prospective transferor would have nothing to fear from subsequent obligations which he could ignore with impunity—or it may be found that there is no substantial risk of self-incrimination—from which it would follow that a transferor who failed to demand an order form could raise no valid objection to those obligations. But the claims which might be raised in such a prosecution are not in issue here. Whatever protection the privilege might afford petitioner in those circumstances cannot be advanced to immunize his failure to comply with the primary requirement to receive an order form.

Finally, the risk of self-incrimination which the retention and inspection provision creates is, as a practical matter, "imaginary and unsubstantial" (see *Marchetti*, 390 U.S. at 48). Those requirements apply only to transferors who do receive order forms, and then only after order forms are received. Even if it is assumed that an order form addressed to an unregis-

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<sup>10</sup> Failure of a transferor to comply with the retention or inspection requirement is not specifically made unlawful under any provision of the marihuana statutes. Criminal penalties are available under general statutes, e.g., 26 U.S.C. 7203, enforcing federal reporting and record-keeping requirements, but those statutes are rarely, if ever, invoked in these circumstances. Compare note 8, *supra*.

tered transferor could be obtained," it is almost impossible to imagine a situation in which one of the 80-odd registered transferees would secure an order form to acquire marihuana on the illegal market. And the consequence of this Court's decision in *Leary*, while affirming the right of unregistered transferees to obtain order forms upon payment of the \$100 per ounce transfer tax, is to relieve such persons of any compulsion to do so. Thus, the extreme unlikeliness that an unregistered transferor would ever be subject to the retention and inspection requirements makes it impossible to state that a "very substantial risk of self-incrimination" is created by those requirements.

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<sup>11</sup> Our argument throughout this brief has implicitly adopted this assumption: *i.e.*, that an unregistered transferor *would be able* to comply with Section 4742(a) because a transferee could obtain an order form to acquire marihuana from an unregistered transferor. We are informed, however, that it does not appear that an order form addressed to an unregistered transferor has ever been applied for or issued. Nothing in the statute or regulations specifically prohibits the issuance of such an order form, but it may be argued that authority to deny an application for such a form may be derived from the premise, absent any contrary indication in the legislative history, that Congress did not contemplate the issuance of an order form for a transfer which could not lawfully be made by an unregistered transferor. If that argument, which we do not press here, is accepted, then it would follow that the order form requirement of Section 4742(a) creates no risk of self-incrimination for an unregistered transferor because he would never be put in a position to comply with it; the order form requirement, as to him, would constitute a complete prohibition against all transfers. Cf. Brief for the United States in *Leary v. United States*, No. 65, O.T. 1968, pp. 23-29; *Webb v. United States*, 249 U.S. 96, 99.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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SEPTEMBER 1969.

## APPENDIX

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26 U.S.C. 4741 provides:

(a) Rate.

There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.

Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, \$1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.

Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, \$100 per ounce of marihuana or fraction thereof.

(b) By whom paid.

Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

26 U.S.C. 4742 provides in pertinent part:

Order forms.

(a) General requirement.

It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to

transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

\* \* \* \* \*

(c) Supply.

The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such forms shall be sold shall be fixed by the Secretary or his delegate, but shall not exceed 2 cents each. Whenever any of such forms are sold, the Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same.

\* \* \* \* \*

(d) Preservation.

Each such order form sold by the Secretary or his delegate shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of 2 years so as to be readily accessible for inspection by an officer or employee mentioned in section 4773. The copy given to the purchaser shall be retained by the purchaser and preserved for a period of 2 years so as to be readily accessible to inspection by any officer or employee mentioned in section 4773. The second copy shall be pre-

served in the records of the internal revenue district.

\* \* \* \*

26 U.S.C. 4743 provides:

The stamps provided in section 4771(a)(1) for marihuana shall be affixed by the Secretary or his delegate to the original order form.

26 U.S.C. 4744 provides in pertinent part:

(a) Persons in general.

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

\* \* \* \*

26 U.S.C. 4751 provides in pertinent part:

Imposition of tax.

Every person who imports, manufactures, produces, compounds, sells, deal in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities and thereafter on or before July 1 of each year, pay the following special taxes respectively:

\* \* \* \*

(5) Persons not otherwise taxed.

Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and

who deals in, dispenses, or gives away marihuana, \$3 a year; *Provided*, That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufacturer, compounded, or produced by him without further payment of the tax imposed by this section;

\* \* \* \* \*

26 U.S.C. 4753 provides in pertinent part:

(a) In general.

Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

\* \* \* \* \*

26 U.S.C. 4754(a) provides:

(a) Registrants.

Any person who shall be registered under the provisions of section 4753 with the Secretary or his delegate shall, whenever required to do so by the Secretary or his delegate, render a true and correct statement or return, verified by affidavits, setting forth the quantity of marihuana received or harvested by him during such period immediately preceding the demand of the Secretary or his delegate, not exceeding 3 months, as the Secretary or his delegate may fix and determine. If such person is not solely a producer, he shall set forth in such statement or return the names of the persons from whom said marihuana was received, the quantity in each instance received from such persons, and the date when received.

26 U.S.C. 4755(a)(1) provides:

(a) Trafficking.

(1) Liability.

It shall be unlawful for any person required to register and pay the special tax under the

provisions of sections 4751 to 4753, inclusive, to import, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe administer, or give away marihuana without having so registered and paid such tax.

26 U.S.C. 4771 provides in pertinent part:

§ 4771. Stamps.

(a) Method of payment.

(1) Stamps.

The taxes imposed by sections 4701 and 4741 shall be represented by appropriate stamps, to be provided by the Secretary or his delegate.

\* \* \* \* \*

26 U.S.C. 4773 provides:

§ 4773. Inspection of returns, order forms, and prescriptions.

The duplicate order forms and the prescriptions, including the written record of oral prescriptions, required to be preserved under the provisions of section 4705 (c) (2) and (e), and the order forms and copies thereof and the prescriptions and records required to be preserved under the provisions of section 4742, in addition to the statements or returns filed in the office of the official in charge of the internal revenue district under the provisions of sections 4732(b) or 4754, shall be open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana. The Secretary or his delegate is authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in the office of any official in

charge of an internal revenue district to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States as shall be entitled to inspect the said **statements or returns** filed in the office of the official in charge of the internal revenue district, upon the payment of a fee of \$1 for each 100 words or fraction thereof in the copy or copies so requested. \* \* \*

26 U.S.C. 4775 provides:

§ 4775. List of special taxpayers.

The **Secretary or any officer or employee designated by him is authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in the respective internal revenue districts as special taxpayers under the provisions of sections 4721 to 4726, inclusive, section 4702 (a), section 4751, or section 4752, upon payment of a fee of \$1 for each 100 names or fraction thereof in the copy so requested.** \* \* \*

26 C.F.R. 152.63 provides:

Method of payment.

The tax is paid by attachment of adhesive stamps to order forms as hereinafter shown. Stamps of various denominations are available. Payment for the stamps shall be made when application for the order form is submitted.

26 C.F.R. 152.66 provides:

Written order required for transfer of marihuana.

Except as otherwise provided, every person seeking to obtain marihuana shall make application on Form 679a (Marihuana) to the district director of internal revenue for the district in which the transferee is located for the purchase of an order form. The application shall show (a) the transferee's name, address,

and, if registered, the registration number, (b) the name and address of the transferor, and (c) a description, including quantities, of the desired articles or materials to be transferred. The application must be accompanied by a check, cash, or money order in payment of the transfer tax (see § 152.62), plus 2 cents in payment for the order form.

26 C.F.R. 152.105 provides:

Records open to inspection.

All order forms, duplicate forms, prescription records, returns, and inventories required under the provisions of subchapter A, chapter 39, relating to marihuana, or the regulations in this part to be kept on file shall be kept so that they can be readily inspected.

# SUPREME COURT OF THE UNITED STATES

Nos. 189 AND 271.—OCTOBER TERM, 1969

James Minor, Petitioner, 189                   v. United States.	} On Writs of Certiorari to the United States Court of Ap- peals for the Second Circuit.
Michael Buie, Petitioner, 271                   v. = United States.	

[December 8, 1969]

MR. JUSTICE WHITE delivered the opinion of the Court.

These cases raise related questions about the availability of the Fifth Amendment as a defense to convictions for selling narcotic drugs and marihuana without the written order forms required by law.

James Minor, petitioner in No. 189, sold heroin on two separate occasions in 1967 to an undercover narcotics agent. Having waived trial by jury, petitioner was convicted in the United States District Court for the Southern District of New York of selling narcotics not pursuant to a written order on an official form—a violation of § 2 of the Harrison Narcotics Act, 26 U. S. C. § 4705 (a).<sup>1</sup>

Michael Buie, petitioner in No. 271, sold five packages of marihuana in May 1967 to an undercover narcotics agent. The agent did not have the official order form required for such transactions by § 6 of the Marihuana

<sup>1</sup> Section 4705 (a) provides:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

2 MINOR v. UNITED STATES

Tax Act, 26 U. S. C. § 4742 (a).<sup>2</sup> A jury in the United States District Court for the Southern District of New York convicted petitioner of violating § 4742 (a).

In separate opinions, the Court of Appeals for the Second Circuit affirmed both convictions over objections in each case that the statutory obligation to sell only in pursuance of an official order form violated petitioner's Fifth Amendment privilege against self-incrimination. *United States v. Minor*, 398 F. 2d 511 (1968); *United States v. Buie*, 407 F. 2d 905 (1969). We granted certiorari, 395 U. S. 932, 395 U. S. 976, to consider petitioners' Fifth Amendment claims, particularly in light of our intervening decision in *Leary v. United States*, 395 U. S. 6 (1969). For the reasons which follow, we affirm the judgments in both cases.

We deal first with No. 271. Under the Marihuana Tax Act, 26 U. S. C. §§ 4751-4753, every person who sells, deals in, dispenses, or gives away marihuana must register with the Internal Revenue Service and pay a special occupational tax. The Act also imposes a tax on transfers of marihuana, to be paid by the transferee; the rate for those who have registered and paid the occupational tax is \$1 per ounce, for those who have not or who cannot register the rate is \$100 per ounce. Under § 4742 (a) it is illegal to transfer marihuana except pursuant to a written order of the transferee on a form obtained by the latter at the time he pays the transfer

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<sup>2</sup> Section 4742 (a) provides:

"It shall be unlawful for any person . . . to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Under 26 U. S. C. § 7237 (b), any person who violates the provisions of §§ 4705 (a) or 4742 (a) "shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than \$20,000."

tax. The order form when issued must carry the name and address of both buyer and seller and the amount of marihuana to be purchased. 26 U. S. C. § 4742 (c). Other provisions of § 4742 require the form to be issued in triplicate, one copy to be retained by the Internal Revenue Service, the other copy to be kept in the buyer's files, and the original to be delivered to the seller and retained by him. 26 U. S. C. § 4742 (d). Both original and copies are open to inspection by federal and state law enforcement officers. 26 U. S. C. §§ 4742 (a), 4773.

Buie argues that because the buyer's order must be on the form issued by the Secretary and because § 4742 (c) requires the seller's name and address to be on the form before its issuance to the buyer, the seller is forced to incriminate himself: he is forced to insist on an order form linking him to an illicit transaction and in many instances must furnish one of those links himself by giving his name to the buyer so that the latter will have the data necessary to secure the form. Moreover, it is said that the very act of selling pursuant to the order form forces the seller to admit that he is the person named in the document and to acknowledge the sale of specified amounts of marihuana on a specified date; the sale also leads to the further requirement that both seller and buyer retain a copy of the form open to inspection by law enforcement officials.

We have considerable doubt that any of these arguments would withstand close scrutiny,<sup>3</sup> but we find it

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<sup>3</sup> The obligation to furnish the necessary information is in terms placed on the buyer; while his compliance with that obligation may "inform" on the seller, it would not ordinarily be thought to result in the latter's "self-incrimination." Nor is there anything in the record to suggest that buyers cannot get a seller's name except through the seller himself, or that the simple act of selling pursuant to an order form—even assuming the act is "testimonial" for purposes of the Fifth Amendment—adds significantly to the information

unnecessary to appraise them in detail because we have concluded that there is no real and substantial possibility that Buie's purchaser, or purchasers generally, would be willing to comply with the order form requirement even if their seller insisted on selling only pursuant to the form prescribed by law.

The situation of the buyer is this: if he applies for the order form he must announce his intention to purchase marihuana—a transaction which, if he is unregistered, will involve a tax of \$100 for each ounce of marihuana involved in the impending sale and which is illegal under both federal and state law. We have great difficulty in believing, and nothing in this record convinces us, that one who wishes to purchase marihuana will comply with a seller's request that he incriminate himself with federal and local authorities and pay \$100 per ounce in taxes in order to secure the order form. The possibility is particularly unlikely in view of the fact that the Fifth Amendment relieves unregistered buyers of any duty to pay the transfer tax and secure the incriminating order form. *Leary v. United States*, 395 U. S. 6 (1969). Except that they are sources of marihuana, sellers have no magic power over buyers; and the characteristics of marihuana do not suggest that buyers would be driven by such urgent need that to get the drug they would incriminate themselves at the seller's behest and pay the prohibitive tax imposed on

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which the Government has already obtained from the buyer. Finally, whatever the merits of a seller's attempt to assert the privilege in a prosecution for failure to keep and exhibit the order forms, it need not follow that he can similarly dispense with the requirement that he sell only to buyers who first identify themselves, via the order form, as lawful purchasers. Cf. *Nigro v. United States*, 276 U. S. 332, 351 (1928); *United States v. Doremus*, 249 U. S. 86, 94 (1919).

the transfer. As insistent as sellers might be, it is extremely unlikely that buyers would comply.

Buie's situation thus bears little resemblance to the situation which confronted Leary. The vice of the statute in that case—as in *Marchetti v. United States*, 390 U. S. 39, *Grosso v. United States*, 390 U. S. 62, and *Haynes v. United States*, 390 U. S. 85—stemmed from the dilemma which confronted the buyer. The statute purported to make all purchases of marihuana legal from the buyer's viewpoint at his option; all he had to do to avoid the federal penalty was to secure the form and pay the tax. But to exercise that option and avoid the federal penalty, he was forced to incriminate himself under other laws. In the present case, the first horn of this dilemma does not confront the seller. In the face of a buyer's refusal to secure the order form, the option of making a legal sale under federal law is foreclosed by the buyer's decision, and "full and literal compliance" with the law by the seller means simply that he cannot sell at all.<sup>4</sup> There is no real and substantial possibility that the § 4742 (a) order form re-

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<sup>4</sup> It would have been no answer in *Leary* to suggest that the buyer avoid his dilemma by not buying. See *Marchetti v. United States*, 390 U. S. 39, 51-52. But the buyer in *Leary*, unlike the seller here, was presented with the possibility of both purchasing and complying with the federal law, if he would only incriminate himself. In the present case, compliance by selling is foreclosed as a viable option not because the seller might incriminate himself, but because the buyer refuses to meet a specified condition. Nothing in the Fifth Amendment prevents Congress from restricting a seller's market to specified classes of duly licensed buyers. And although the buyer's refusal to comply with the Act's requirements may stem from his fear of incrimination, the buyer's personal privilege cannot be raised by the seller as an excuse for evading the clear statutory requirement. See *George Campbell Painting Corp. v. Reid*, 392 U. S. 286 (1968); *Rogers v. United States*, 340 U. S. 367 (1951).

quirement will in any way incriminate sellers for the simple reason that sellers will seldom, if ever, be confronted with an unregistered purchaser who is willing and able to secure the order form.

This conclusion is not affected by the fact that there is a tiny number of registered marihuana dealers—some 83 in the entire country according to government figures for 1967.<sup>5</sup> In order to register, dealers must show that they are in compliance with local laws<sup>6</sup> and, when registered, can get order forms by paying a transfer tax of only \$1 per ounce. A registered dealer is thus not subject to the deterrent pressures operating on the unregistered dealer. But the possibility that a registered dealer would present an order form to an unregistered seller like Buie is itself an hypothesis more imaginary than real; any buyer who can purchase marihuana from a legitimate source is hardly likely to find it to his advantage to secure the drug instead on the illegal market. In any event, it is quite clear in this case that Buie's customer was not a registered dealer. Nor is there anything to suggest that he would have been willing or able to get an order form had he been asked.

No. 189. The same result must follow in Minor's case and for similar reasons. The Harrison Narcotics

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<sup>5</sup> U. S. Treasury, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs 42 (1967).

<sup>6</sup> The regulations, 26 CFR §§ 152.22, 152.23, which limit registration to persons whose dealings are legal under relevant state and local laws, are supported by the legislative history and represent what is by now long-established administrative practice. See *Leary v. United States*, 395 U. S. 6, 24 n. 38 (1969); H. R. Rep. No. 792, 75th Cong., 1st Sess., 2 (1937); S. Rep. No. 900, 75th Cong., 1st Sess., 3 (1937); Hearings on H. R. 6906 before a subcommittee of the Senate Committee on Finance, 75th Cong., 1st Sess., 6 (1937); Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess., 8 (1937).

Act, 26 U. S. C. § 4701 *et seq.*, applies to various drugs, including heroin. Dealers must register and pay an occupational tax, 26 U. S. C. §§ 4721-4722; producers or importers who sell must purchase stamps and affix them to the package, 26 U. S. C. §§ 4701, 4703, 4771 (a)(1); and it is illegal to purchase or sell except from the original stamped package, 26 U. S. C. § 4704 (a). As in the case of the Marihuana Tax Act, all transfers, with exceptions not relevant here, must be made pursuant to a written order form issued by the Government. 26 U. S. C. § 4705 (a). Only dealers who are in compliance with state law may register, and only registered dealers may secure order forms. 26 U. S. C. §§ 4705 (f), (g); see 26 U. S. C. § 4721; 26 CFR § 151.24. Order forms are issued in triplicate to proper applicants and are stamped only with the name of the prospective purchaser. 26 U. S. C. § 4705 (f); 26 CFR § 151.161. When a purchaser decides to execute a form, he fills in the exact date of the order and the number and type of drugs requested and signs his name to the form. 26 CFR §§ 151.163-151.165; 151.167. The purchaser retains the duplicate and delivers the original and the triplicate thus executed to the seller, who enters the number and size of the stamped packages furnished and the date when each item is filled. 26 CFR §§ 151.161 (a); 151.185. A regulation, 26 CFR § 151.201, requires the seller to forward the triplicate to the Internal Revenue Service at the end of the month. Section 4705 (d) of the Act requires both seller and buyer to keep their respective copies for a period of two years and to make them accessible to inspection by law enforcement officers.

The order form provisions for narcotic drugs thus differ from the marihuana provisions in three principal respects. First, the prospective seller's name does not have to be given to the Government when the order form

is secured, but is filled in only when the form is subsequently executed.<sup>7</sup> Second, although the marihuana seller apparently does not have to add anything to the order form in making the sale, the seller of narcotics must enter the amounts sold and the dates. Finally, unlike the Marihuana Tax Act, which at least in theory permits any person to buy as long as the transfer tax is paid, the Harrison Narcotics Act explicitly forbids the sale of order forms to any but registered dealers and permits registration only by those "lawfully entitled" under the laws of their State to deal in the drug.<sup>8</sup>

Like Buie, Minor argues that compliance with the order form provision would compel him to give incriminating information to be preserved in his and the buyer's files and to be made readily accessible to law enforcement agents. Like Buie's argument, Minor's argument assumes that an order form would otherwise be forthcoming if he refused to sell without it<sup>9</sup> and founders if

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<sup>7</sup> It is not specified in either the statute or the regulations when the blank for the seller's name is filled in or by whom. But the form itself is addressed "to" the seller, and the form and the regulations contain provisions which enable a form "made out to" one seller, to be endorsed by him to another if the first seller cannot fill the order. See 26 CFR § 151.189. This suggests that it is the buyer who fills in the seller's name when he sends in the order. Whether or not that is the case in fact is irrelevant under the analysis in the text.

<sup>8</sup> The difference between the availability of order forms under the Harrison Narcotics Act and the Marihuana Tax Act was explicitly recognized by Congress when it passed the latter Act. See *Leary v. United States*, 395 U. S. 6, 21-22 (1969). The regulation restricting registration to those "lawfully entitled" to deal in narcotic drugs, 26 CFR § 151.24, finds specific support in the language of the Act. See 26 U. S. C. §§ 4705 (g), 4721.

<sup>9</sup> Even if order forms could realistically be secured, Minor's Fifth Amendment arguments are no more persuasive than Buie's. See n. 3, *supra*.

in reality there is no substantial possibility that the buyer would or could have secured an order form. As in Buie's case, we are convinced that this possibility is an unreal one. Prospective buyers who have either failed to register or cannot register because their dealings in the drug are illicit—and petitioner himself strenuously argues that virtually all dealings in heroin are illicit<sup>10</sup>—simply are not among the class of persons to whom sellers are permitted to sell under any condition. When dealing with buyers in this class, the seller faces no risk of incrimination by reason of § 4705 (a) since there will be and can be no order form involved. Confronted with would-be buyers in this class, "full and literal compliance" with § 4705 (a) leaves the seller only one alternative: not to sell. Since from this record it is clear that Minor's

<sup>10</sup> See Brief for Petitioner, at 22-23. Convinced that "[h]eroin has no medical value that is not better served by legitimate drugs," S. Rep. No. 1997, 84th Cong., 2d Sess., 7 (1956), Congress in 1956 required the surrender of all theretofore lawfully possessed heroin, to be distributed only as approved by the Secretary for purposes of scientific research. 18 U. S. C. § 1402. The Narcotic Drugs Import and Export Act, 35 Stat. 614, as amended, 21 U. S. C. §§ 173, 174, effectively prohibits the importation of heroin or of opium for the purpose of manufacturing heroin, and makes it a felony to traffic in drugs knowing them to have been unlawfully imported. The Narcotics Manufacturing Act of 1960, 74 Stat. 55, 21 U. S. C. § 501 *et seq.*, prohibits the manufacturing of heroin except as authorized for limited scientific purposes. Given the resulting absence of original stamped packages of heroin, 26 U. S. C. § 4704 (a) effectively forbids buying, selling, dispensing, or distributing the drug. Since for all practical purposes there is thus no legitimate dealing in heroin, any attempt to use an order form to purchase the drug would almost certainly subject the buyer to prosecution under 26 U. S. C. § 4705 (g):

"It shall be unlawful for any person to obtain by means of said order form narcotic drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession."

customer was not a registered buyer, the alleged possibility of incrimination is purely hypothetical.

We doubt that our conclusion would be different even if Minor's customer were registered. It is true that there were some 400,000 registered dealers under the Harrison Narcotics Act in 1967<sup>11</sup> and that registered dealers can readily get order forms issued in blank. It is conceivable, of course, that a registered dealer would seek to buy heroin on the illegal market, but it is difficult to imagine that he would enter the name of an unregistered seller on the order form and make a record of what would surely be an illegal sale.<sup>12</sup> Such unlikely possibilities present only "imaginary and insubstantial" hazards of incrimination, rather than the "real and appreciable" risks needed to support a Fifth Amendment claim.<sup>13</sup>

The judgments in both cases are affirmed.

*It is so ordered.*

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent in No. 271.

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<sup>11</sup> See U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs 22, 42 (1967).

<sup>12</sup> Even if the hypothetical became a reality, it is doubtful that the incriminating information would get back to the Government via the buyer, who would himself be guilty of a violation of the narcotics laws. See n. 10, *supra*. See also 26 CFR § 151.181, which provides that order forms may be filled only by registered sellers—a class to which Minor does not belong. It is significant that of the nearly 400,000 registered dealers in 1967, only four were reported during that year for a violation of the narcotics laws. See U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs 22 (1967).

<sup>13</sup> The dissent suggests that the courts should refuse to enforce § 4705 (a) as part of a revenue measure. But these very order form provisions were upheld long ago as valid revenue laws even though they operated to prevent large classes of people from obtain-

[Footnote 13 continued on page 11]

Footnote 13—Continued.

ing order forms—and hence from acquiring drugs—at all. *United States v. Doremus*, 249 U. S. 86 (1919); *Webb v. United States*, 249 U. S. 96 (1919); see *Nigro v. United States*, 276 U. S. 332 (1928). A statute does not cease to be a valid tax measure because it deters the activity taxed, because the revenue obtained is negligible, or because the activity is otherwise illegal. See, e. g., *Marchetti v. United States*, 390 U. S. 39, 44 (1967); *United States v. Kahriger*, 345 U. S. 22, 28 (1953); *License Tax Cases*, 5 Wall. 462 (1867).

Even viewing § 4705 (a) as little more than a flat ban on certain sales, it is sustainable under the powers granted Congress in Art. I, § 8. See *Yee Hem v. United States*, 268 U. S. 178, 183 (1925). *Brolan v. United States*, 236 U. S. 216, 222 (1915); cf. *United States v. Sullivan*, 332 U. S. 689 (1948); *United States v. Darby*, 312 U. S. 100 (1941).

# SUPREME COURT OF THE UNITED STATES

No. 189.—OCTOBER TERM, 1969

James Minor, Petitioner,		On Writ of Certiorari to the United States Court of Ap- peals for the Second Circuit.
v.		
United States.		

[December 8, 1969]

MR JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The guilt of petitioner on this record seems plain. Two counts charge sales of heroin on two different dates in 1967 "not in pursuance of a written order form." He was found guilty on each count by the District Court, a trial by jury having been waived. The basis of his attack upon his conviction in this Court is that the requirement of an order form violates his privilege against self-incrimination. But that is not the end of the matter for me. Mr. Justice Holmes used to say that one dealing with the Government should turn square corners. See *Rock Island R. R. v. United States*, 254 U. S. 141, 143. When the present all-powerful, all-pervasive Government moves to curtail the liberty of the person, it too should turn square corners.

The statute involved in this case, 26 U. S. C. § 4705 (a), was derived from the Anti-Narcotic Act of December 17, 1914, c. 1, 38 Stat. 785, commonly called the Harrison Narcotics Act. This Act, as amended, imposes an occupational tax on registered dealers in narcotics, 26 U. S. C. §§ 4721-4722, and also imposes a commodity excise tax on narcotics sold or removed for consumption or sale, 26 U. S. C. § 4701. Under § 4705 (a), with certain exceptions not relevant here, all transfers of narcotics must be made pursuant to an official order form given to the transferor by the transferee. The order form can be

obtained only by persons properly registered to deal in narcotics. It was conceded by the Government on oral argument, however, that "it is impossible to secure an order form for the purchase of heroin . . . . The order forms may only be used to purchase a lawful drug for a lawful purpose. Heroin is an unlawful drug for which there is no lawful purpose."

The Federal Government does not have plenary power to define and punish criminal acts. Its power in this regard derives from other powers specifically delegated to it by the Constitution, as the Tenth Amendment provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Section 4705 (a) derives from the power "to lay and collect taxes." Its constitutionality on this basis was sustained in *United States v. Doremus*, 249 U. S. 86—a five-to-four decision. It was there said that the "order form" requirement tended "to keep the traffic above-board and subject to inspection by those authorized to collect the revenue," and also tended "to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by federal law." *Id.*, at 94.

As I view this case, the Government is punishing an individual for failing to do something that the Government has made it impossible for him to do—that is, obtain an order form from the prospective purchaser prior to making a sale of heroin. Petitioner did, of course, have the option not to sell the heroin, and in that sense his compliance with the statute was indeed quite possible. This argument, however, overlooks the fact that the statute does not simply outlaw all sales of heroin. The critical interest of the Government is necessarily in the

collecting of the tax imposed by the Act, and it is the order form which provides the crucial link to this proper constitutional purpose. In *Nigro v. United States*, 276 U. S. 332, 341, Chief Justice Taft, speaking for the Court, said:

"In interpreting the Act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress and must be regarded as invalid . . . ."

Thus it is the order form—not the mere sale—that constitutes the heart of the offense for which this petitioner was convicted. I do not see how the Government can make a crime out of not receiving an order form and at the same time allow no order forms for this category of sales.

Nor is it relevant to suggest, as does the majority opinion, *ante*, at —, n. 13, that a statute imposing a flat ban on sales of heroin might be sustainable under the Commerce Clause. We are concerned in this case with what the Congress did, not with what it might have done or might yet do in the future. It is clear that what Congress did in § 4705 (a) was to enact a taxing measure. And the crime charged was not selling heroin, but selling it "not in pursuance of a written order form," as prescribed in § 4705 (a).

I would reverse this judgment of conviction.